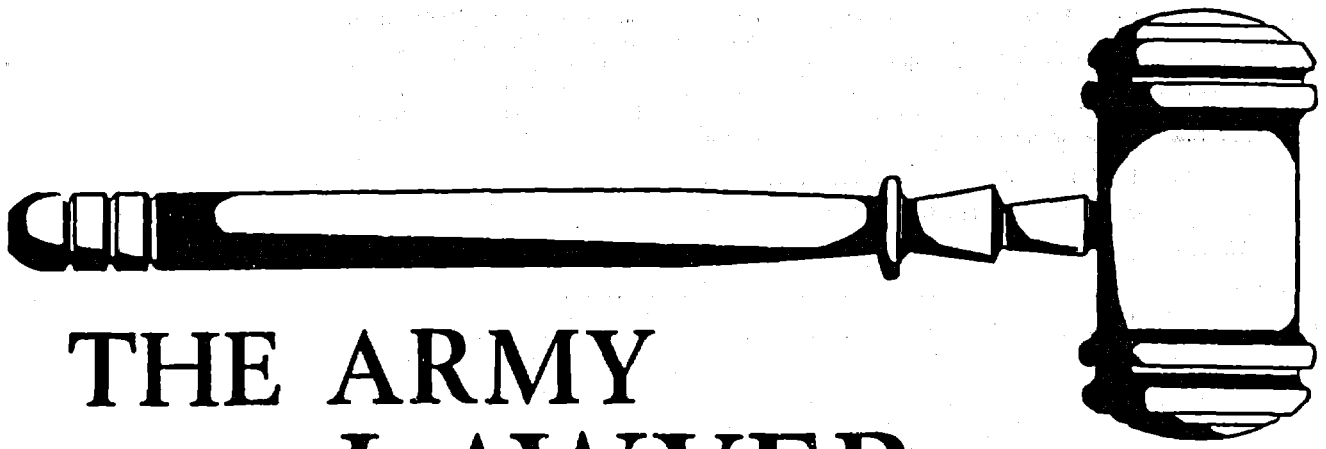

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Cross-Examination for Trial Defense Counsel

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This article reflects a personal view of cross-examination from the perspective of a regional defense counsel. Before taking that job, I had gained almost all of my trial experience as a prosecutor. In every case I tried, I feared the damage the trial defense counsel could inflict with an effective cross-examination. As a government appellate counsel, I read hundreds of records of trial. Some records contained excellent cross-examinations and some records contained bad ones. Frequently, the good and the bad would appear in the same case, conducted by the same attorney only minutes apart. As an instructor at The Judge Advocate General's School, I saw basic and graduate course students perform hundreds of practice cross-examinations. I recently have read several very good books that depict cross-examinations performed both well and poorly.[1] While watching television, I have seen the television lawyer's version of a cross-examination. The only part the television lawyer ever gets right is the drama, inherent in any cross-examination, that "the truth will win out." The television image of a cross-examination is ubiquitous, and not always inaccurate, but, outside of a television studio, an effective cross-examination never happens by itself. Invariably, a defense counsel must make it happen.[2]

A trial defense counsel should start with the question: Why conduct a cross-examination? Bear in mind that nothing *requires* you to cross-examine a witness. Generally speaking, unless a cross-examination will benefit your client, you should not cross-examine the witness. I have seen many a weak direct examination saved by an effective redirect after the defense counsel pursued a purposeless cross-examination. The defense attorney's questions produced no useful testimony and actually hurt the accused's case by revealing to the trial counsel the elements that he or she had failed to prove on direct.

If you do elect not to cross-examine, help the military judge a little. Announce, "No cross-examination, Your Honor, the witness may be excused temporarily." Excusing the witness is not your job, of course, but this phrase sends a subtle message to the judge and the court members that they need ask no questions either. If the judge falls into your trap, he or she then may ask, "Why temporarily? Do you want the witness later, or will you recall the witness?" If you know you will not need the witness yourself, you should reply, "Oh no, Your Honor, you may excuse the witness permanently." This will force the trial counsel to jump in and make the poor witness wait around all day for nothing.

Often, you may think you want to cross-examine a witness. The desire to do so may grip you like some primal urge, but you must resist it. You must force yourself to know *why* you want to cross-examine this particular witness. The best reason to conduct a cross-examination is to generate evidence—usually in the form of testimony. You also may cross-examine a witness, however, to

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[1] I strongly recommend as valuable professional reading Francis L. Wellman's classic, *The Art of Cross-examination*. The fourth edition was published in 1936 by Colliers Books. At least two biographies of Earl Rogers are available; the one by his daughter, Adela Rogers St. Johns, entitled *Final Verdict*, is worth reading on several levels. Mr. Rogers, a brilliant trial defense counsel, had much to teach other advocates, young and old. I was directed to both these books through the kindness of Colonel Craig Jacobsen, then the Senior Military Judge in Frankfurt, Germany.

[2] Although I describe how a defense counsel can "make it happen" in the last third of this article, readers also may find a wonderful starting point in Judge Irving Younger's famous Ten Commandments of Cross-examination. Judge Younger's cogent exposition on his commandments appears in a pamphlet called *The Art of Cross-examination*, published by the Section of Litigation of the American Bar Association in its monograph series. *See generally* Irving Younger, *The Art of Cross-examination*, 1976 A.B.A. Sec. Litig. To refresh your recollection, the Ten Commandments of Cross-examination are:

1. Be brief.
2. Use plain words.
3. Use only leading questions.
4. Be prepared.
5. Listen.
6. Do not quarrel.
7. Avoid repetition.
8. Disallow witness explanation.
9. Limit questioning.
10. Save for summation.

Id.

establish a foundation for demonstrative or physical evidence that you will need to support your closing argument.[3] To use cross-examination for these purposes, you must construct a theory of the defense case in advance and—at least mentally—outline in detail the argument that you expect to use in summation. You must take care, however, to observe Judge Irving Younger's tenth commandment—never confuse cross-examination with final argument. Always save your "ultimate points" for your summation.[4]

Closing arguments generally address two broad areas: substance—or, "What really happened here?"; and credibility—or, "Whose story should you believe?" Once you accept that the primary purpose of cross-examination is to gain evidence for your closing argument and that your argument will depend primarily on issues of substance and credibility, you should begin to sense the issues upon which you must focus to conduct an effective cross-examination.

Purely Tactical Cross-examination

Any good rule has its exceptions. In practice, you may find several good reasons to cross-examine a witness that have little to do with substance or credibility. For example, in a trial with members, the court members may expect you to conduct a hard-hitting cross-examination of an adverse witness even if his or her testimony has had no significant impact on your case. Imagine that the key Government witness in a circumstantial case of murder has testified that she saw your client running from an alley in which a dead person later was found. She asserted vigorously that, when she saw him, your client was carrying a gun. The Government previously had introduced evidence that the victim died of a gunshot wound. Your defense theory, however, is entirely self-defense. You do not need to cross-examine this witness because she did not see the confrontation that led to the shooting and because, in any event, your client must admit presence at the scene. Even so, you still may want to perform a brief cross-examination just to show the members that the witness has no knowledge of the really important aspects of the case.

TDC: Specialist Doe, you have absolutely no personal knowledge of what occurred in this case before you saw my client running, do you?

WIT: No.

TDC: And you did not know of the long standing threats the dead man had uttered against my client before he died, did you?

WIT: No.

TDC: Thank you, nothing further.

Assume, now, that you are representing another client, who has no affirmative defense claim. You know, however, that the key Government witness is a notorious liar. Unfortunately, an experienced liar who has a simple lie to tell—like the lie this witness is telling in court today—is unlikely to waffle or to trip up under cross-examination. A classic example of this proficient liar would be a drug user turned government informant who regularly sets up other soldiers in drug deals.

Assume further that you have failed to find any clear bias or prejudice with which to attack the witness's credibility. Instead, you plan to invoke Military Rule of Evidence (MRE) 608(a)[5] to introduce opinion and character evidence in your case-in-chief that will devastate the witness's character for truthfulness. Accordingly, on cross-examination you would ask the witness only if he knows certain people—people that you will bring in to testify later.

TDC: Private Jones, you know a Sergeant George G. Brown, a member of A Company, 123d Signal Battalion, don't you?

WIT: Yes.

TDC: In fact, isn't Sergeant Brown your duty supervisor?

WIT: Yes.

TDC: And he has been your supervisor for the last six months hasn't he?

WIT: Yes.

TDC: Thank you, nothing further.

Let the members wonder what that is all about for a while. You have planted the seed from which future doubt may grow.

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[3]Occasionally, a trial defense counsel must defend solely on extenuation and mitigation evidence, or on the "good soldier" defense. In these cases, the evidence that the defense attorney elicits in his or her cross-examination on the merits will carry over into the sentencing argument. A detailed analysis of the use of cross-examinations for sentencing purposes, however, would exceed the scope of this article.

[4]*See supra* note 2.

[5]Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 608(a) [hereinafter Mil. R. Evid.]. Military Rule of Evidence (MRE) 608 governs evidence of character, conduct, and bias of witness issues. Subsection (a) specifically addresses the use of opinion and reputation evidence of character, stating that

> [t]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

On occasion, you simply may need to slow down the Government's parade. If opposing counsel truly is rolling along, a cross-examination that breaks the Government's rhythm or that highlights a few unimportant points may throw the members off the track or cool off the trial counsel. This use of cross-examination is like making a proper technical objection to derail a prosecutor's direct examination. You never want the other side to get on a roll. Certainly, you must be knowledgeable of your ethical duties under the Professional Rules[6]—particularly Rules 3.1 through 3.5[7]—and of any other applicable ethical standards of your state bar, but you also must remember that your client has a right to have adverse witnesses cross-examined and that, as a zealous advocate, you may owe your client a duty to do just that.

The foregoing examples, however, merely demonstrate tactical excuses for cross-examination. The best reasons to cross-examine a witness relate to uncovering issues of substance or credibility for use in closing argument.

Substance

Sometimes a Government witness will have useful data, favorable to the defense, that a good prosecutor will not let slip on direct examination. You always should cross-examine to uncover those facts—never wait to recall the witness in your case-in-chief. In a cross-examination, you can frame the evidence with good leading questions. Once you have induced the witness to agree with your carefully worded suggestions, you are ready to argue.

Occasionally, a trial counsel, through inadequate preparation or in a deliberate attempt to appear fair or to "take the sting" out of your cross-examination, will let a witness say good things for the defense. Even then, you should try to accentuate the positive by performing a cross-examination that highlights key favorable information.

Finally, you also may cross-examine a witness to elicit "negative substance" testimony. You frequently see this in a trial defense counsel's cross-examination of a Criminal Investigation Command (CID) agent. "Special Agent Roe, you never personally have seen Private Smith, my client, in possession of any illegal drugs, have you?" is typical of the negative substance questions you may ask on cross-examination.

Similarly, in a circumstantial evidence case, you can cross-examine each prosecution witness to reveal what he or she does not know about events that transpired before or after the witness observed the subject of his or her testimony. This often breaks the incriminating chain of circumstances that the Government has suggested.

TDC: It was not unusual for you to see my client in the hallway at that time, was it?

WIT: No.

TDC: And when you saw him that night he was not doing anything that made you suspicious of him, was he?

WIT: No.

TDC: In fact, that hallway is a common passage for people in the unit, isn't it?

WIT: Yes.

This sort of questioning can reveal that the Government's conclusions are not intuitively obvious to an innocent observer, but are simply the product of a suspicious, prosecutorial mind. By emphasizing this theme, you may portray the Government's chain of circumstances as an ill-knit string of prosecutorial innuendo that offends an accused's constitutional presumption of innocence.

Cross-examination to Impeach

Now I come to the heart of cross-examination. The slash and burn, seek and destroy, leave them turning and twisting slowly in the wind, fun of ripping apart the testimony of an adverse witness! In short, I refer to impeachment—in this case, the use of cross-examination to destroy a witness's credibility and to identify that witness as a person unworthy of belief.

Perhaps the most significant basis for impeachment is a witness's prior inconsistent statement. It stands in stark contrast to the witness's words on direct examination and demands an explanation—which the defense counsel cleverly does not permit the witness to offer immediately. Properly emphasized, a prior inconsistent statement can sow significant doubts in the minds of the members. Therefore, the defense counsel must exploit this useful defect in the Government's case quickly. To unearth all of a witness's prior utterances is a difficult task, but in this article I will assume that you already have done that.[8] The discussion that follows will focus instead on the use of cross-examination to elicit evidence that a witness has given in a prior inconsistent statement.

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[6]Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers (31 Dec. 1987).

[7]*See generally id.*, rule 3.1 (meritorious claims and contentions); *id.*, rule 3.2 (expediting litigation); *id.*, rule 3.3 (candor toward the tribunal); *id.*, rule 3.4 (fairness to opposing party and counsel); *id.*, rule 3.5 (impartiality and decorum of the tribunal).

[8]For two excellent sources that all counsel can use to prepare for this aspect of trial work, see James A. Nortz, *Discovery Under Rule for Courts-Martial 701(e)—Does Equal Really Mean Equal?*, The Army Lawyer, Aug. 1989, at 21; Alan K. Hahn, *Preparing Witnesses For Trial—A Methodology for New Judge Advocates*, The Army Lawyer, July 1982, at 1.

I must start by reviewing some of the rules of evidence that govern the use of "prior statements." Military Rule of Evidence 801 provides that a witness's prior inconsistent statement is not hearsay if the witness made this prior statement under oath, subject to the penalty of perjury, at a trial, hearing, or other proceeding, or in a deposition.[9] If the statement is otherwise admissible—that is, generally speaking, if the proponent has authenticated it properly[10]—the counsel may present it as substantive evidence.[11] The court then may consider the statement not only as evidence that impeaches the testimony of the witness on direct examination, but also as substantive proof of the facts asserted in the prior inconsistent statement.

Unfortunately for defense counsel, these statements occur only rarely. More frequently, a witness's prior inconsistent statement will not be admissable under MRE 801, but may be admitted for purposes of impeachment under MRE 613.[12]

Military Rule of Evidence 613 essentially provides counsel with two methods of impeachment. The first permits you to confront a witness directly.[13] Thus, on cross-examination you could demand, "Isn't it true you made a prior statement that is contrary to what you have just said?" or "Isn't it true that on a prior occasion you said the car was green, not blue as you just testified?" Your only foundation requirement, beyond having a good-faith basis to ask the question, is an ability to disclose to the opposing counsel the prior statement to which you are referring upon request.[14] This form of impeachment, however, is not particularly effective, especially if the witness expressly denies that he or she ever uttered the inconsistent statement.

The second method of impeachment permits you to introduce "extrinsic evidence" of a witness's prior inconsistent statement.[15] Extrinsic simply means external or coming from without—in this sense it refers to evidence other than the testimony of the witness you seek to impeach. Typically, this evidence appears in a written document, but you also could seek to introduce it through the testimony of a person who heard the soon-to-be impeached witness make the contrary or inconsistent statement.

The latter method of impeachment under MRE 613 requires a more substantial evidentiary foundation than does the former. The impeached witness must have "an opportunity to explain or deny" the prior statement, and opposing counsel must have an opportunity to redirect, or "interrogate," the witness about the prior statement.[16] These requirements, however, rarely will undermine the efficacy of your impeachment. Invariably, any explanation that the witness or the trial counsel may offer will appear to be just that—an excuse. The contradiction will continue to stand out and in your closing argument you may denounce it as a falsehood, a mistake, the product of a faulty memory, or a sign of bias or prejudice.

The introduction of the concept of bias suggests another line of cross-examination. Military Rule of Evidence 608(c) permits you to impeach a witness by introducing evidence to show the witness's bias, prejudice, or motive to misrepresent the truth. You may present this evidence either through the witness's own testimony on cross-examination or through the introduction of other evidence.[17] Extrinsic evidence, if relevant, is admissible.[18] The only foundation you must have to offer this evidence is a good-faith belief in the basis of your question.

Bias is any influence that would tend to color a witness's testimony. It may appear as the witness's personal dislike of the accused or as his or her prejudice against the accused's racial, religious, or social group. The military community is educated not to express bias or prejudice. Incidents that reveal a witness's bigotry or animosity very likely will stand out in people's memories. Consequently, if you intend to confront a witness

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[9] Mil. R. Evid. 801(d)(1)(A).

[10] *See generally* Mil. R. Evid. 901 (establishing the requirement of authentication).

[11] Mil. R. Evid. 801(d).

[12] This evidentiary rule governs most uses of prior statements of witnesses. *See generally* Mil. R. Evid 613.

[13] *See* Mil. R. Evid 613(a).

[14] *See id.* ("on request, the ... [statement] shall be shown or disclosed [by the proponent] to [the] opposing counsel"). The rule, however, further provides that "[i]n examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time." *Id.*

[15] *See* Mil. R. Evid. 613(b); *see also* United States v. Callara, 21 M.J. 259, 265 (C.M.A. 1986) ("the prior inconsistent statement need not be offered or mentioned during cross-examination, but may be withheld until other witnesses are called") (quoting Steven A. Saltzburg et al., Military Rules of Evidence Manual 311 (1st ed. 1981)).

[16] Mil. R. Evid. 613(b). The evidentiary rule, however, "does not specify any particular timing for the opportunity for the witness to explain or deny the statement ...." *Callara*, 21 M.J. at 265. "Indeed, as long as he [or she] has the opportunity to explain or deny it at some point, the requirement of the Rule is satisfied." *Id.*

[17] *See* Mil. R. Evid. 608(c) ("Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced").

[18] *See* United States v. Banker, 15 M.J. 207, 212 (C.M.A. 1983); Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 608 analysis, app. 22, at A22-42 [hereinafter Mil. R. Evid. 608 analysis]; *see also* Stephen A. Saltzburg et al., Military Rules of Evidence Manual 520 (2d ed. 1986).

with evidence of comments or actions that reveal a relevant impeachable bias, you should consider interviewing that witness's neighbors and coworkers.

Impeachment by evidence of bias or prejudice requires a deft touch. You must use effective leading questions that are grounded solidly on extrinsic evidence. Even so, it may provide you with a persuasive closing argument along the following lines. A court-martial is supposed to be a forum of fairness and justice. This witness's evidence, however, is the product of bias or prejudice. Accordingly, it does not deserve to be given any credibility and the court should ignore it.

Bias and prejudice often take on real forms. Imagine, for instance, that your client is a soldier of Vietnamese extraction. The sole witness to his alleged barracks larceny is a soldier who previously had written the word "gook" with an indelible marker on the door of the accused's room. The witness's roommate saw him do this. Evidence of this specific act is admissible under MRE 608(c) as indicative of bias;[19] therefore, you could ask the witness, "Isn't it true that you wrote "gook" on the door?" If the witness denies the act—or even if he admits it—you then could invoke MRE 608(c) in your case-in-chief and examine the roommate who saw it done.[20] Alternately, if the witness denies defacing the door, you could ask him pointblank if he ever *said* that he had done so. If he again denies it, you then could call a bystander who heard the witness say he did it.[21] In that case, however, you would have to ensure that the Government retained the witness at trial.[22]

Military Rule of Evidence 608(b)(1) offers yet another method of impeachment. If you know of a previous "instance of [a witness's] conduct" that is probative of untruthfulness—for example, if you have evidence of the witness's prior, discrete act of lying—then, at the judge's discretion, you can use it to confront the witness on cross-examination.[23] Accordingly, you could ask, "Isn't it true that you have told such and such a lie?"[24] You may not introduce extrinsic evidence to prove the lie, however, so you may be stuck with the witness's answer, even if that answer is a false denial.[25]

The greatest analytical difficulty in this form of impeachment is to determine the relationship between a given "act" or an "instance of conduct" and a witness's "credibility" or "character for ... untruthfulness." Evidence of lying is easy to get in, but evidence of cheating is harder to admit. To admit evidence of other crimes is harder still. Does a bad check lie? The answer well may turn on the defense counsel's advocacy before the military judge.

A prior conviction—which the Military Rules of Evidence define to include "a court-martial case ... [in which] a sentence is adjudged"[26]—is one form of discrete act that clearly is admissible to impeach a witness.[27] Moreover, you may prove a witness's prior conviction with extrinsic evidence.[28] Here, too, technique can enhance the effect of the impeachment. Ideally, you should have the documentary evidence of the witness's conviction marked as an exhibit. If possible, you also should introduce it into evidence before you seek to impeach the witness to whom it relates—unless you intend to surprise the Government with your knowledge of the prior conviction. On cross-examination, you first should show the exhibit to the witness and then—in a rare exception to Judge Younger's short question commandment, try to load all of the document's discrediting details into one unstoppable question. For example, you might ask,

> Private Johnson, I now show you Defense Exhibit A, which has been previously admitted ... examine it please ... doesn't that document reflect that two years ago on the twelfth of June you were convicted

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[19] *See, e.g., Banker*, 15 M.J. at 212.

[20] *See id.*

[21] *See* Mil. R. Evid. 613(b) (permitting introduction of extrinsic evidence of a witness's prior inconsistent statement); *see also supra* note 15 and accompanying text.

[22] *See* Mil. R. Evid. 613(b).

[23] *See* Mil. R. Evid. 608(b)(1).

[24] Mil. R. Evid. 608(b); *see also* Mil. R. Evid. 608 analysis at A22-42.

[25] Mil. R. Evid. 608(b); United States v. Owens, 21 M.J 117 (C.M.A. 1985). Note, however, that despite this prohibition on the use of extrinsic evidence, if the witness's prior dishonesty is a significant point of impeachment, you still could attempt to impeach him or her using opinion or reputation evidence. *See* Mil. R. Evid 608(a). Presumably, the person to whom the witness lied—usually your source for the impeaching question—will have an admissible opinion about the witness's bad character for untruthfulness.

[26] Mil. R. Evid. 609(f).

[27] *See* Mil. R. Evid. 609. Counsel should be aware, however, that MRE 609 imposes definite limits on an advocate's use of evidence of a witness's prior conviction. Most significantly, a party may impeach a witness under this evidentiary rule only if: (1) the authorized punishment for the crime exceeds a certain level of severity and the military judge finds that the evidence's probative value outweighs its prejudicial effect; or (2) the crime of which the witness was convicted involved dishonesty or false statement. *See* Mil. R. Evid. 609(a). In certain cases, the evidentiary rule imposes additional restrictions. *See, e.g.*, Mil. R. Evid. 609(b) (timeliness element); Mil. R. Evid. 609(c) (giving special consideration to pardons, annulments, or other subsequent actions affecting the conviction); Mil. R. Evid. 609(d) (sharply restricting admissibility of evidence of a witness's convictions as a juvenile); Mil. R. Evid. 609(e) (discussing the effects of a witness's pending appeal).

[28] *See* Mil. R. Evid 609(a) ("[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if ... established by public record during cross-examination").

by a special court-martial of filing a false claim and of making a false official statement and were sentenced to four months confinement and reduction to the grade of Private (E-1)?

Now we come to a different impeachment consideration. Frequently, witnesses from the same or related units know one another for a variety of reasons. If this is so, the current witness may know of a prior witness's reputation for untruthfulness or may have formed a personal opinion as to the prior witness's bad character for untruthfulness or lack of credibility. The current witness's testimony on these matters, admissible under MRE 608(a), could provide you with useful impeachment evidence to discredit the Government's witnesses.

Sometimes a witness will know of a particular act or a "specific instance of conduct" that is relevant to a prior witness's character for untruthfulness. For example, were the current witness to testify that the purported victim of an assault—whom you earlier had impeached as a liar on cross-examination—has a reputation for truthfulness, you then could cross-examine the current witness about the putative victim's character for untruthfulness.[29] Moreover, in your cross-examination, you legitimately could inquire into the current witness's knowledge of specific instances of the victim's dishonesty.[30] "Sergeant Dupree, did you know that Private Jackson lied to the first sergeant last month about his weapon being clean?" You could go on and on, using every good-faith-based question you could dig up, subject only to the discretion of the military judge.[31] You must remember, however, never to conclude with a argumentative summary question: "Well, Sergeant Dupree, knowing all that, how can you say Private Jackson has a good reputation for truthfulness?" If you do, you almost always will get an answer you will not like. Leave this question unspoken on cross-examination and let the members deduce it for themselves. In closing argument they readily will join you in discounting the quality of the witness's supportive reputation evidence about the victim and will remember your cross-examination about all the lies the so-called victim has told before.

The latter two forms of impeachment are often useful on cross-examination. Their overall effectiveness is somewhat limited, however, because they can discredit only witnesses that already have left the stand. Both approaches lack the stirring sense of confrontation inherent in the cross-examination of a witness who presently is testifying.

To conclude this section on credibility and impeachment on cross-examination, I want to move away from the Military Rules of Evidence and return to common sense. By common sense, I mean the practical considerations that should govern your use of impeachment evidence.

In most cases, witnesses testify from memory. The accuracy of a witness's memory is clearly relevant to the credibility of his or her present testimony. Always explore the quality of a witness' memory during the pretrial interview. Even though the alarming experience of witnessing all or part of a criminal act frequently sharpens a witness's memory, you must not assume that this always will be the case. Quite often you can obtain useful cross-examination material by inquiring into the clarity of a witness's recollections.

Each witness's testimony also may be limited by the clarity of his or her perception of the events. "Knowledge" may come from many sources, but evidence and testimony should derive only from the witness's personal observations. These observations you should examine carefully during pretrial preparation and in witness interviews. Doing so will permit you to fashion a very effective opening cross-examination question along the following lines: "Private Jones, you did not personally see who shot Sergeant Smith, did you?" Insofar as you can show that a witness was out of line of sight, suffered from obscured vision, was busy with other duties, or was not concentrating on the criminal events, you may argue that his or her testimony is incomplete or unpersuasive. Moreover, by questioning the accuracy of a witness's perception, you can avoid taking the often uncomfortable position that the witness is lying. You may claim instead that he or she simply was mistaken, for any of the understandable reasons mentioned above.

To Cross or Not to Cross, That Is the Question

Let's step back now and think through the decisions of when, and who, to cross-examine. Please note that these are not decisions that you should make at trial. You should address these issues much earlier, as part of your pretrial preparations. I suggest that, as you consider them, your analytical process should go something like this:

1. Examine each potential witness from the perspective of the trial counsel. Analyze the Government's case. Would the trial counsel want to call this person as a witness? What does this person know about the events? Could anyone else provide the same information more effectively? What problems could arise with using this person as a witness?

[29] Mil. R. Evid. 608(b)(2).

[30] *Id.*

[31] Mil. R. Evid. 608(b).

2. Envision the probable testimony of each potential witness. What would this person say if called to testify? What role did he or she play in the alleged offense? What has he or she said previously about the events? Does the person fall into any special or protective category, such as an immunized witness or a child witness, that may affect your cross-examination?

3. Consider the possible impact of this witness's testimony. What effect will it have on your defense? Try to imagine how the trial counsel will use this testimony in his or her final argument. What comments will he or she make? Is the evidence merely neutral, or, if not, do you expect that your anticipated defense will neutralize it? If so, you may wish to cross-examine the witness on negative substance issues. On the other hand, if the witness's testimony actually could benefit the defense, you might consider using your cross-examination to reinforce it.

4. If you conclude that the evidence would hurt your client's case, determine what you can do to minimize the adverse impact of the evidence. Should you develop an effective impeaching cross-examination to attack the witness or the witness's testimony head on? Can you neutralize the adverse impact of the evidence by agreeing to a stipulation, a deposition, or another alternative form of evidence? Alternately, can you offset the impact of the evidence adequately in your defense case-in-chief? If so, you may not need to perform a cross-examination.

5. If cross-examination is your best option, on what subjects should you cross the witness? Return to the previous three sections of this article to review possible bases for impeachment or substantive cross-examination.

Preparation of the Cross-examination

Assume you have applied this analysis and have concluded that you ought to cross-examine a witness to impeach his or her testimony or to elicit some form of substantive evidence. How, then, do you get ready to do it?

You must start by mastering the relevant facts. You cannot ask a good leading question on cross-examination if you do not know what the witness will—or must—say in response. Two good places to acquire information through a gentle application of your cross-examination are witness interviews and Uniform Code of Military Justice (UCMJ) article 32[32] pretrial investigations—if you can afford to risk tipping your hand to the Government.

Counsel also must visit the particular scene that is relevant to the witness's testimony. A good cross-examiner normally knows as much as—if not more than—the witness. Unless you visit the spot where the witness observed the event, under similar conditions of time, lighting, and weather, you automatically forfeit part of that essential advantage.

Get to know the witnesses. Interview the witnesses you must cross-examine. Do not make them fear you. Be friendly—until you finally nail them in court. You should try to know each witness by reputation and duty performance. Your knowledge and insight into their personalities will help you to do a better job on cross-examination. A witness may be cocky, timid, aggressive, defensive, or stupid. Any of these traits should color the approach you take on cross-examination.

Admittedly, if you are representing the accused in a "garden variety" drug case with an experienced CID handler, a relatively clean registered source or drug suppression team agent as the buyer, normal extenuation and mitigation evidence, and a fair pretrial agreement, indulging in all this preparation and analysis for cross-examination smacks of overkill. If you learn how to do the whole job, however, you will find that deciding when and how to take shortcuts will be much easier.

You should take care to write down trial notes in sufficient detail that you easily can call to mind your main points on cross-examination, your targets for impeachment, the facts for your leading questions, other necessary substantive facts, and citations to relevant rules for admissibility. Moreover, you can use these notes to map out the best sequence of questions for your cross-examinations and to prepare your closing argument. Finally, you can use the notes as a "stage prop," on which you note each witness's answers during cross-examination.

One point I cannot emphasize enough—use only leading questions on cross-examination. On cross, you testify. Almost never should you ask a witness, "why?" I am aware of only one exception to this time-honored rule. In his novel, *And The Sea Will Tell*,[33] Vincent Bugliosi, an exceptional trial attorney, describes a technique in which the cross-examiner first cuts off a witness's every possible line of escape, *then* asks the witness, "why?" When performed properly, this attack reveals with devastating clarity the witness's lack of a reasonable explanation. To use this technique properly requires deliberate planning. Nevertheless, in military practice, with the article 32

[32] Uniform Code of Military Justice art. 32, 10 U.S.C. § 832 (1988).

[33] Vincent Bugliosi, And the Sea Will Tell—Murder and Justice on a Desert Island (1991).

investigation process, it frequently may be available to a well-prepared defense counsel. Consider this line of defense questioning, at an article 32 hearing, of an ill-prepared Government witness whose explanations on direct examination of a subjective set of circumstances seemed illogical, inconsistent, or simply untrue:

1. Have you had a full and complete chance to answer all the questions put to you?

2. Is there anything you have not told us about your knowledge of these events under investigation?

3. Is there anything you have said that you want to change or correct or that you are not certain about?

4. In other words, you have told us everything you know about the subject, is that right?

5. And you have told us the truth, the whole truth and nothing but the truth, is that right?

You almost certainly will get affirmative answers to all these questions. Be sure you have a good verbatim record made or a friendly witness to record and remember the sequence of questions and answers. Only after you have induced the witness to lock himself or herself into a single version of the events and have left him or her with no credible, alternative explanations can you safely ask, "why?" at trial. Only then can you be sure that the witness will respond either with his or her unbelievable answer or with a new story that you can impeach easily with the witness's prior sworn testimony.

Keep your questions short. Three short questions are better than one long, complex one. Almost all cross-examination questions should call for a "yes" or "no" answer. The use of short questions that elicit yes or no responses also generates a pace and rhythm that will help you to gain and maintain control over a witness. Avoid compound questions; break them down into their elements. Do not give the witness a chance to appear confused or to quibble. Avoid legalese; both the witness and the court members will find it hard to follow.

Try to maintain conscious control over the witnesses. If you listen to your own questions and carefully read your records of past trials, you can learn to ask questions that permit no explanations. The form of each question, your sequence of questions and follow up questions, your pace, and your tone of voice all will contribute to your control over the witness. Remember, silence invites a response from the witness. Be ready to speak up and move on. Your use of exhibits and physical evidence also can help you to control the witness—"Take this. Read it. Examine it. Have you done so? Do you recognize it?" You are the master and you must dominate the relationship.

Listen to, and note, the answers of each witness. To listen effectively and still be ready to ask the next question with good pace, tone, sequence, and control, you must maintain a clear idea of where you want the cross-examination to go. This is why you must outline your intended cross and the expected answers. Perhaps you might wonder, then, why you should listen if you already know the questions and the answers. Frankly, you should listen to show the panel that you care. If the witness's answers appear unimportant to you, they will seem unimportant to the members. Simply seeing you note a witness's answer, however, may lead the members to believe that you have scored a significant point.

Remember how the members will perceive a good cross-examination. It is like a tennis game: question to the right, answer to the left, question back, answer returned, question again, answer back, counsel-witness, counsel-witness, until you conclude with, "Nothing else, Your Honor, the witness may be excused." Using this style of cross-examination you can win game, set, match, and—ideally—acquittal after your closing argument.

An argument with the witness disrupts the "game." Like a dispute over a line call, an argument breaks your rhythm, pace, and tone. Moreover, an argument distracts your attention from your actual target. You cannot develop facts for your argument to the panel by bickering with a witness. Reserve your contentions for your closing argument, when you may present them without a distracting contradiction from the witness. Always remember your target of persuasion. The members, not the witnesses, vote in deliberations.

At times, however, witnesses may have a critical effect on deliberations. Sometimes, when you least expect it, your cross-examination will spark a great response from a witness. Indeed, it may be so wonderful that you feel that you should shut up and sit down. Do so! That is court room drama; that is memorable; that is persuasive. Great answers are rare—but they do occur. Be alert for them.

Having come to the end of my article, I shall follow my own last words of advice. Make your point—or points—and *stop*. Elicit helpful evidence, impeach as appropriate, and sit down. Thereafter, object promptly to any attempt by the prosecutor to use leading questions in redirect examination and prepare to drive home in summation the telling points you raised in your cross-examinations.

Losing Sight of *Christian* Values: The Evolution and (Disturbing) Implications of the *Christian* Doctrine

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Christian came to the government contracts bar as a surprise bordering on disequilibrium. But the shock lay more in the realm of theory than injustice on the facts.[1]

Introduction

The 1963 Court of Claims decision in *G.L. Christian & Associates v. United States*[2] has been one of the most influential cases in federal public contracts law.[3] *Christian*, which incorporated by operation of law a mandatory termination for convenience clause into a government contract from which that clause had been omitted, established what has come to be known as the "*Christian* doctrine." This court-made doctrine permits a finder of fact to "read[] into a government contract a provision [that is] required by law or by a regulation having the force and effect of law that was omitted from the executed contract, either intentionally or by inadvertence, and [to] treat[] the contract as valid and enforceable with the omitted mandatory provision read into it."[4]

The various boards of contract appeals initially resisted *Christian*, but later they began to apply it with ever increasing frequency. The boards, however, accepted *Christian* only at the expense of the important policies that underlie the doctrine. In their hands the doctrine has evolved from a fair, policy-grounded analytical tool to a mechanical formula, the use of which is frequently unsupported by public policy or equitable considerations.[5] On the other hand, the Comptroller General has considered public policies carefully to fashion a well-reasoned, functional approach to resolving bid protests that stem from solicitations from which a required contract clause has been omitted.[6]

This article traces the development of the *Christian* doctrine. It starts by examining *Christian* itself and the policies upon which that decision was grounded. It then discusses the various decisions deriving from *Christian*, as well as a new branch of the *Christian* doctrine, under which the boards of contract appeals have incorporated discretionary contract clauses into government contracts.[7] The article concludes by offering advice to government contracting personnel on how to avoid *Christian*-type problems and by recommending a reevaluation of the *Christian* doctrine by courts, boards, and policymakers.

The *Christian* Decision

Christian arose in 1958, when the deactivation of Fort Polk forced the Department of the Army to terminate a $32.9 million construction contract. The contractor responded to the cancellation by submitting claims for costs incurred, settlement expenses, and lost profits.[8] The Army attempted to settle these claims in accordance with the standard "termination for convenience of the government" clause outlined in the Armed Services Procurement Regulations (ASPR). Under this clause, the contractor could claim a profit allowance for work it already had performed, but not for anticipated profits.[9] The contractor, however, argued that because the Army had failed to include this termination for convenience clause in the contract, the Army's cancellation of the project constituted a breach of contract. The contractor claimed that it thus was entitled to common-law damages for breach, including anticipated profits.

The *Christian* court noted that ASPR 8.703 expressly required the armed forces to insert the standard termination for convenience clause into certain contracts.[10] It then observed that, because the ASPR had been "issued

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[1] Harold Leventhal, *Public Contracts and Administrative Law*, 52 A.B.A. J. 35, 38 (1966).

[2] 312 F.2d 418, *reh'g denied*, 320 F.2d 345, *cert. denied*, 375 U.S. 954 (1963), *reh'g denied*, 376 U.S. 929 (1964).

[3] One commentator stated in 1977 that *Christian* "has been the most cited case in public contracts law." *See* Joel P. Shedd, *The Christian Doctrine, Force and Effect of Law, and Effect of Illegality on Government Contracts*, 9 Pub. Cont. L.J. 1, 1 (1977). By 1977, *Christian* had been cited in over 100 decisions by courts, boards of contract appeals, and the Comptroller General. *Id.* at 7 & n.30. Since then, citations to *Christian* in these fora have increased to over 300.

[4] *Id.* at 1.

[5] *See infra* notes 18-67 and accompanying text.

[6] *See infra* notes 69-75 and accompanying text.

[7] *See infra* notes 76-90 and accompanying text.

[8] *Christian*, 312 F.2d at 422-23. Although the construction project was behind schedule and was only 2.036% complete when it was cancelled, *see id.* at 423, the contractor's claims for profit alone totalled over $5 million, amounting to approximately 15% of the total contract price. *See id.* at 419.

[9] The pertinent federal regulation in *Christian* was ASPR 8.703, published at 4 C.F.R. ch. I, subch. A (Rev. 1954). The current version of this regulation appears at Federal Acquisition Regulation 49.502. *See* Fed. Acquisition Reg. 49.502(b)(1)(ii) (1 Apr. 1984) [hereinafter FAR].

[10] *Christian*, 312 F.2d at 424.

under statutory authority," it had the "force and effect of law."[11] The court reasoned that if ASPR 8.703 applied to the contract in the instant case, "there was a legal requirement that the plaintiff's contract contain the standard termination clause and the contract must be read as if it did."[12] Concluding that ASPR 8.703 actually did cover the construction contract, the court limited the contractor's recovery in accordance with the physically absent—but legally incorporated—termination for convenience clause.

In large part, the court based its legal analysis on public policy concerns. Specifically, it asserted that the termination for convenience clause represented a "deeply ingrained strand of public procurement policy" that furthered the "major governmental principle" of disallowing anticipatory profits.[13] Significantly, the court also noted that, although the contract did not contain the actual termination clause, four explicit references to a possible "termination of the Housing Contract for the convenience of the Government" did appear elsewhere in the contract. The contractor thus was on notice that the government might exercise that option.[14] In a motion for rehearing, the court expanded upon this equity-based notice issue, explaining that "[a]bove all, we cannot believe the familiar and established phrase 'termination for the convenience of the Department' meant, in this contract, a cancellation which would be a breach of contract."[15]

Although one might question the logic of the *Christian* decision,[16] the result certainly appears fair. Manifestly, the court should not have permitted the contractor to recover a multimillion dollar windfall after completing only two percent of the contract. Only time would tell, however, if *Christian*'s salient policies—the advancement of critical public procurement policies and of equity-based concerns regarding the contractor's predispute knowledge of this policy—would retain their vitality in factually distinct cases.

Early Development of the *Christian* Doctrine

After the Court of Claims decided *Christian*, courts, boards, and commentators struggled to determine the decision's applicability and its method of application. Some legal theorists interpreted *Christian* to mean that all procurement regulations have the force and effect of law and "automatically [must be] incorporated into any Government contract to which they are applicable."[17] Courts and boards, however, faced with the prospect of interpreting and applying *Christian* in actual cases, were less inclined to ascribe to it such sweeping significance. Although *Christian* was cited in over 100 court and board decisions between 1963 and 1976, in only one of these decisions did an adjudicator incorporate a mandatory contract clause into a contract.[18] In every other decision, the court or board either found that *Christian* did not mandate incorporation or resolved the dispute without addressing the incorporation issue.[19]

A good example of the early reluctance of the contract appeals boards to apply *Christian* is *Traubco, Inc.*, a 1974 decision of the Armed Services Board of Contract Appeals (ASBCA).[20] In *Traubco, Inc.*, a National Security Agency (NSA) contracting officer had failed to

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[11] *Id.*

[12] *Id.*

[13] *Id.* at 426-27.

[14] *Id.*

[15] G.L. Christian v. United States, 320 F.2d 345 (Ct. Cl. 1963) (denying motion for rehearing and reargument). Interestingly, in its initial opinion, the court stated that the contract contained four references to "termination ... for the convenience of the Government," *see Christian*, 312 F.2d at 427, yet in the opinion denying plaintiff's motion for rehearing, the court twice stated that the contract contained four references to "termination ... for the convenience of the *Department*." *See Christian*, 320 F.2d at 350, 354 (emphasis added).

[16] *See* Shedd, *supra* note 3, at 21. Discussing the *Christian* doctrine, the author asks,

> When a procurement regulation states that a particular clause shall be inserted in a particular type of contract, can it be said that the real purpose and intent of the drafters of the regulation is that the specified clause shall be a part of the contract regardless of whether it is inserted therein? ... To interpret procurement regulations as requiring the contractor to comply with contract clauses which the contracting officer has left out of the contract ... without giving the contractor any price adjustment for the increased costs incurred in complying with the omitted clauses, would be, not only inequitable, but [also] contrary to long-established federal procurement practices.

Id. Arguably, this criticism loses much of its force when applied to the *Christian* decision itself, because in *Christian* the contractor knew—or should have known—when it entered into the contract that government might terminate the contract for convenience. *See supra* text accompanying notes 14-15. In other cases in which the doctrine has been applied, however, Judge Shedd's criticism may be more appropriate.

[17] *See* Herman M. Braude & John Lane, Jr., *Modern Insights on Validity and Force and Effect of Procurement Regulations—A New Slant on Standing and the Christian Doctrine*, 31 Fed. B.J. 99, 100 (1972) (citing John J. Cibinic, *Contract by Regulation*, 32 Geo. Wash. L. Rev. 111 (1963)); Keeffe, *Christian Government Contracts*, 49 A.B.A. J. 1225 (1963)).

[18] *See* Shedd, *supra* note 3, at 7-10 & n.30. The one decision during this period in which an adjudicator held that *Christian* mandated incorporation appears at 47 Comp. Gen. 457 (1968). In that decision, the Comptroller General held that an assumption of liability provision, prescribed by section 10-554 of the Army Procurement Procedures (C34, 31 Jan. 1962), was "read into" a no-cost termination settlement agreement by operation of law. This decision did not involve a bid protest and, thus, arose in a different context than do most Comptroller General decisions. *See infra* notes 69-75 and accompanying text (discussing the Comptroller General's treatment of bid protests). Moreover, in this decision the Comptroller General incorporated the assumption of liability provision to protect the rights of a third party with whom the Government had no privity of contract. For a more detailed discussion of this interesting and unusual decision, see Shedd, *supra* note 3, at 15-17.

[19] *See* Shedd, *supra* note 3, at 8-17.

[20] ASBCA No. 17,992, 74-2 BCA ¶ 10,710.

include a mandatory disputes clause in a contract between the contractor and an NSA nonappropriated fund instrumentality (NAFI). The contractor later filed bankruptcy and assigned proceeds due to it under the contract to a third party. The third party then attempted to collect on the contract from the federal government. When the government refused to pay, the assignee appealed to the ASBCA.

Because the ASBCA's jurisdiction over the assignee's claim derived solely from the missing clause, the Board apparently faced a dilemma—either it had to incorporate the disputes clause into the contract, or it had to dismiss the underlying claim for lack of jurisdiction.[21] The case would seem to have been an ideal candidate for an application of the *Christian* doctrine.[22] Not only did federal regulations require the inclusion of the disputes clause, but incorporation of the clause also would have furthered important procurement policies and have ensured fairness. Moreover, both parties specifically addressed *Christian* in their briefs.[23] The Board, however, neatly sidestepped the issue, establishing jurisdiction by a more circuitous route. The Board first noted that its own charter allowed it to exercise jurisdiction pursuant to "any directive whereby the Secretary of Defense ... has granted a right of appeal not contained in the contract."[24] It then found that Department of Defense Directive 5515.6[25] required all claims arising out of NAFI operations to be processed under procedures used to process similar claims against appropriated fund activities. The Board interpreted this directive as empowering it to exercise jurisdiction over the appeal in accordance with its charter.[26]

The ASBCA again revealed its reluctance to use the *Christian* doctrine in *Chamberlain Manufacturing Corp.*[27] In *Chamberlain Manufacturing*, the government failed to include a mandatory government property clause in a contract. The contractor asked the Board to incorporate this clause under *Christian*. The Board refused, stating,

> [T]he Court's decision in *Christian* [clearly] was grounded largely upon the public procurement policy ... against recovery of anticipated but unearned profits ....
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> ....
>
> The Government Property Clause ... [, however,] bespeaks no procurement policy comparable to the policy against allowance of anticipated profits ....
>
> *Incorporation of a clause into a contract by operation of law is an extraordinary remedy and should be undertaken only under extraordinary circumstances.* We fail to perceive such circumstances here.[28]

Traubco, Inc. and *Chamberlain Manufacturing Corp.* illustrate the attitude that then pervaded the courts and boards. All were loathe to apply the *Christian* doctrine during its infancy. Whether this attitude stemmed from the absence of fundamental procurement policies favoring incorporation, or merely from the unspoken desire to avoid forcing upon the parties contract terms to which they had not agreed expressly, the results were the same. Until the late 1970's, the *Christian* doctrine was a conceptually intriguing, but practically unattainable, tool.

Eventually, the ice broke. Slowly and carefully at first, the boards began to apply *Christian*. In time, as they realized that the sun still shone on the days following their uses of the doctrine, they applied it more often.

In the 1977 decision of *Commonwealth Electric Co.*,[29] the Board was forced to determine whether it should incorporate an interest clause required by the Federal

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[21] Dismissal would have left the assignee without a remedy, because exchange service contractors like Traubco, Inc.—and, thus, their assigns—could not sue the United States in court. *See* Shedd, *supra* note 3, at 9.

[22] Incorporating the disputes clause would have furthered the important policy of allowing aggrieved contractors—and, incidently, their assigns—to pursue claims with the agency, while denying jurisdiction would have left the assignee without a remedy.

[23] *See* Shedd, *supra* note 3, at 9 & n.36 (in which the author, an administrative judge in *Traubco, Inc.*, discussed his "personal knowledge that the *Christian* Doctrine was argued as a basis for jurisdiction" in that case.

[24] Traubco, Inc., 74-2 BCA at 50,932.

[25] Dep't of Defense Directive 5515.6 (Nov. 3, 1956).

[26] Traubco, Inc., 74-2 BCA at 50,932-36.

[27] ASBCA No. 18,103, 74-1 BCA ¶ 10,368.

[28] *Id.* at 48,961-62 (emphasis added). For other representative examples of decision making during the infancy of the *Christian* Doctrine, see, e.g., Toke Cleaners, IBCA No. 1008-10-73, 74-1 BCA ¶ 10,633 (termination for convenience clause not incorporated because not mandatory); Muncie Gear Works, Inc., ASBCA No. 16,153, 72-1 BCA ¶ 9429 (duty free entry—Canadian supplies clause not incorporated because contracting officer had reasonable basis to believe that Canadian supplies would not be used); Lumen, Inc., ASBCA No. 9698, 65-2 BCA ¶ 4878, at 23,117 (suspension of work clause not incorporated because "the presence or absence of that clause is not material to the grounds of the Board's decision"); White Plains Elec. Supply Co., ASBCA No. 10,011, 1964 BCA ¶ 4460 (duty free entry—Canadian supplies clause not incorporated because not required by law or regulation).

[29] IBCA No. 1048-11-74, 77-2 BCA ¶ 12,649.

Procurement Regulations (FPR)[30] into a contract for the construction of electrical transmission lines. Labelling the issue "one of first impression,"[31] the Board noted initially that the FPR had "the force and effect of law."[32] After examining the policies underlying the relevant FPR provision, the Board decided that to fail to incorporate the interest clause would "allow the total frustration of declared Government policy."[33] Accordingly, it concluded that *Christian* mandated incorporation of the clause into the contract.[34]

Similarly, when confronted in *Transcontinental Cleaning Co.*[35] with the issue of whether to incorporate a mandatory price adjustment clause into a contract, the Board first conducted an exhaustive review of earlier decisions interpreting *Christian*, then analyzed the fundamental procurement policies furthered by the adjustment clause in six lengthy paragraphs, before finally deciding that *Christian* required it to incorporate the clause.[36] In *Lockheed Shipbuilding & Construction Co.*[37] the Board likewise incorporated an interest clause into the contract under the *Christian* doctrine. Although this interest clause was identical to the clause that the Board had incorporated in *Commonwealth Electric Co.* more than two years earlier,[38] the Board nonetheless determined de novo that incorporation of the clause would further "substantial government policy."[39]

Expansion of the Doctrine

The seed that the *Christian* court planted in 1963 took almost fifteen years to germinate, but once the seed took root, it flourished. Beginning in the early 1980's, the boards of contract appeals[40] began to apply *Christian* with increasing frequency. This trend continues to the present day. Unfortunately, the boards appear to have lost sight of the policies underlying *Christian*. Their applications of the doctrine have shifted from one of principled analysis to one of pure mechanical manipulation.

For example, in *Sabre Engineering Corp.*[41] the ASBCA considered whether to insert a termination for default clause into a contract from which it had been omitted. Finding "that the Default clause [indubitably]

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[30] *See* 41 C.F.R. § 1-1.322 (1976). This provision, which became effective five months before the contract was awarded, required federal agencies to include the interest clause in all contracts that contained a disputes clause. The *Commonwealth Electric Co.* contract contained a disputes clause. *See* Commonwealth Elec. Co., 77-2 BCA at 61,323-26.

[31] Commonwealth Elec. Co., 77-2 BCA at 61,327.

[32] *Id.* at 61,328.

[33] *Id.*

[34] Although the *Commonwealth Electric Co.* Board did not discuss the *Christian* policy of equity, its opinion intimates that equitable concerns also were at work in the case. In addressing the underlying claim, the Board noted that the contractor was environmentally conscious, that the contract had required the contractor to "comply with the orders of eight separate governmental jurisdictions," and that the contracting officer first had failed to approve the contract plans as he was required to do and then unsuccessfully had attempted to justify his inaction in his final decision. *See id.* at 61,327.

[35] NASA BCA No. 1075-9, 78-1 BCA ¶ 13,081.

[36] *Id.* at 63,894-97.

[37] DOT CAB No. 73-36C, 79-2 BCA ¶ 14,080.

[38] *See supra* notes 29-34 and accompanying text.

[39] Lockheed Shipbldg. & Constr. Co., 79-2 BCA at 69,257. The Board also remarked that "[a]t least three other boards have reached the same conclusion." *Id.*

[40] Although *Christian* was decided by the Court of Claims, the various boards of contract appeals have been far more active in applying the *Christian* doctrine than have the Court of Claims, the Claims Court, or the federal district courts and appellate courts. Most Claims Court decisions that addressed the issue declined to incorporate the relevant clauses into the contracts. *See, e.g.*, Longview Crop Ins. Agency v. United States, 20 Cl. Ct. 564, 571 (1990) ("master marketing agreement procedures" notice not incorporated because no statute or regulation required incorporation of the notice into the agreement); IBI Sec. Serv. v. United States, 19 Cl. Ct. 106, 107-09 (1990) (price adjustment clause not incorporated because not required by regulation); Johnson v. United States, 15 Cl. Ct. 169, 172 (1988) (termination for convenience clause not incorporated because the Federal Procurement Regulation, 41 C.F.R. § 1-1004-1 (1984), neither required nor allowed incorporation of the clause into lease contract for real property). *But see infra* note 75 (discussing the Claims Court's willingness to incorporate regulations into implied contracts in bid protest situations).

The United States Court of Appeals for the Fifth Circuit expressed its misgivings regarding the logic of *Christian* in Gary Aircraft Corp. v. United States, 698 F.2d 775 (5th Cir. 1983). In that case, the court faced a complex jurisdictional issue in which the Government claimed that the relevant contract's disputes clause was, in effect, statutorily mandated. The court remarked that "[t]he Court of Claims has held, in fact, that this line of reasoning results in contracts being read as if they contained required clauses, even when the actual contract did not." *Id.* at 778. The court added in a footnote that "[t]he Fifth Circuit has noted the position of the Court of Claims without endorsing or rejecting it." *Id.* at 778 n.3 (citation omitted). The next year, however, the Fifth Circuit apparently adopted *Christian* in Clem Perrin Marine Towing, Inc. v. Panama Canal Co., 730 F.2d 186, 188 (5th Cir. 1984) (citing *Christian* with approval while incorporating disputes clause into contract "because [that clause] was required by [a] valid regulation").

The Federal Circuit has not been active in *Christian* issues. Although Court of Claims decisions (including *Christian*) are binding precedent in the Federal Circuit, *see* South Corp. v. United States, 690 F.2d 1368, 1370 (Fed. Cir. 1982), the court has yet to reevaluate *Christian* and generally has avoided relying expressly on *Christian* when deciding incorporation cases. Specifically, in cases in which the Court of Claims probably would have invoked *Christian* to incorporate regulatory proscriptions into contracts, the Federal Circuit has not. *Compare* Chris Berg, Inc. v. United States, 426 F.2d 314 (Ct. Cl. 1970) (citing *Christian* to hold that "[t]he ASPR ... governs the award and interpretation of contracts as fully as if it were made a part thereof") *with* Mil-Spec Contractors, Inc. v. United States, 835 F.2d 865 (Fed. Cir. 1987) (without mentioning *Christian*, holding that FAR provisions governed execution of settlement agreements and that attempted agreement in violation thereof was invalid). The issue addressed in *Chris Berg, Inc.* and *Mil-Spec Contractors*—the effect of violations of regulations on the legality of contracts—is beyond the scope of this article. For a thoughtful, though dated, analysis of this issue, see Braude & Lane, *supra* note 17 at 99.

[41] ASBCA No. 24,144, 81-2 BCA ¶ 15,310.

reflects important procurement policies applicable to administration of fixed-price supply contracts,"[42] the Board incorporated the omitted clause after but one sentence of legal "analysis." In *COMSI, Inc.*[43] the Board probed even less deeply into the issue. It stated simply that "paragraph 33.106(b) of the Federal Acquisition Regulation, in effect at the time the instant contract was awarded, mandates that the Protest After Award ... clause be included in *all* contracts. Accordingly, this mandatory clause ... is deemed to be included in the instant contract by operation of law."[44]

The approach to *Christian* issues, which the boards currently share, is best exemplified by the ASBCA's decision in *Hart's Food Service, Inc.*[45] In that case, Department of the Army officials, acting pursuant to section 8(a) of the Small Business Act, awarded a fixed-price contract to a contractor to provide food services at Brooke Army Medical Center.[46] At the Board hearing, the contractor argued that it was entitled to an equitable adjustment of the contract price, claiming that it had incurred increased operating costs as a result of the substandard condition of the government dining facility's physical plant and equipment. The government did not dispute the poor condition of its facilities. It argued, however, that these substandard conditions had not caused the increased costs and, alternatively, that the contractor had waived any objection by failing to conduct a prebid site inspection.[47]

Although neither party had addressed the omission of the government property (fixed-price) clause from the contract, the Board decided sua sponte that *Christian* required it to incorporate this mandatory clause.[48] Holding that the government had violated its duty under the incorporated clause, it then awarded the contractor an equitable adjustment.[49]

Hart's Food Service, Inc. provides an interesting and informative case study of the current board approach to the *Christian* doctrine. First, the Board decided to apply the doctrine even though neither party had requested it—or even had addressed *Christian* in its argument.[50] The Board then applied the doctrine mechanically, ruling simply that because Defense Acquisition Regulation (DAR) section 7-104.24(a) required inclusion of the clause, the clause must be incorporated by operation of the law.

The major significance of *Hart's Food Service, Inc.*, however, relates to what the Board did not do. Nowhere did it attempt to identify any important procurement policies that would be furthered by the incorporation of the government property clause. This absence is even more striking in light of the Board's earlier decision in *Chamberlain Manufacturing Corp.*. As discussed above,[51] the ASBCA expressly refused to invoke *Christian* to incorporate the government property clause into the Chamberlain Manufacturing contract—even though ASPR 7-104.24(a) specifically required that this clause be included—because it found that incorporation would not further a "deeply ingrained strand of public procurement policy."[52] In *Hart's Food Service, Inc.*, however, the same Board incorporated the same clause[53] that it had rejected in *Chamberlain Manufacturing Corp.* without discussing procurement policy issues, the *Chamberlain Manufacturing Corp.* decision, or any other decisions that address policy issues.

In deciding *Hart's Food Service, Inc.* the Board also failed to address another dominant feature of the original *Christian* decision—the equity-grounded concern that both parties should be on notice of the policies addressed by the incorporated clause.[54] Although the Board's failure to consider the equities of incorporation did no real damage in the instant case,[55] in similar decisions the

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[42] *Id.* at 75,810.

[43] ASBCA No. 34,588, 88-1 BCA ¶ 20,245.

[44] *Id.* at 102,476 (citing *Christian*).

[45] ASBCA No. 30,756, 89-2 BCA ¶ 21,789.

[46] *See* 15 U.S.C. § 637(a) (1988).

[47] *See* Hart's Food Serv., Inc., 89-2 BCA at 109,640-41.

[48] *See id.* at 109,641 (noting that "[n]either party has addressed the absence of a government property clause in the contract and the effects, if any, of such absence on the requested recovery or defense thereto").

[49] *Id.*

[50] *Hart's Food Service* is not the only decision in which a board has invoked *Christian* sua sponte. *See, e.g.*, M.E. McGeary Co., ASBCA No. 36,788, 90-1 BCA ¶ 22,512 (applying *Christian* sua sponte to incorporate disputes concerning labor standards provision into contract and holding that this provision imposed a jurisdictional bar to resolution of the appeal).

[51] *See supra* text accompanying notes 27-28.

[52] Chamberlain Mfg. Corp., ASBCA No. 18,103, 74-1 BCA ¶ 10,368, at 48,961 (quoting *Christian*, 312 F.2d at 426).

[53] In *Hart's Food Service Inc.*, the Board incorporated DAR 7-104(24) into the contract at issue. *See* Hart's Food Serv., Inc., 89-2 BCA at 109,641. In *Chamberlain Manufacturing Corp.*, the Board had refused to incorporate ASPR 7-104(24), an earlier—but identical—version of DAR 7-104(24). *See* Chamberlain Mfg. Corp., 74-1 BCA at 48,961-62.

[54] *See supra* notes 14-15 and accompanying text.

[55] In *Hart's Food Service, Inc.*, incorporation of the omitted government property clause actually helped the contractor because the incorporation entitled it to an equitable adjustment.

results have been less defensible from a policy standpoint.

For example, in *Harry Pepper & Associates*[56] the ASBCA sought to adjudicate a dispute arising from a contract for the construction of a jet engine test cell at Cherry Point, North Carolina. Although this contract contained the standard federal, state, and local taxes clause[57] requiring the contractor to include these taxes in its bid price, it did not include the requisite North Carolina State and local sales and use tax clause.[58] The latter clause, mandatory only for contracts to be performed in North Carolina, requires a contractor to "furnish the Contracting Officer [with] certified statements setting forth the cost of the materials purchased from each vendor and the amount of North Carolina State and local sales and use taxes paid."[59] Because the government had omitted this clause from the contract, the contractor was unaware of the duty to furnish information until the contracting officer specifically asked it to do so.

To collect and report the required information, the contractor had to locate, copy, list, and forward "[h]undreds, if not thousands" of invoices.[60] After performing this work, the contractor requested an equitable adjustment of the contract price to reflect the additional work it had had to complete. The Board denied the contractor's request. Citing *Christian*, it held that because a federal regulation required that the North Carolina tax clause be included in the contract, that clause was incorporated by operation of law. Accordingly, the contractor could not recover because it merely had performed a duty that had existed all along.[61]

Decisions like *Harry Pepper & Associates* highlight the inequities that can arise when a board relies on constructive notice to inform a contractor of requirements that do not appear in the contract itself. Although a regulation that appears in the Federal Register is legally sufficient to provide a contractor with constructive notice, this application of the law arguably overlooks the fairness concerns that the Court of Claims stressed in *Christian*. When the incorporation of an omitted clause would impose duties on a party of which that party previously was unaware, a court or board should examine both equitable considerations and fundamental procurement policies before it determines whether it should apply the *Christian* doctrine.

Despite the Board's insensitivity to these concerns, *Hart's Food Service, Inc.* and *Harry Pepper & Associates* represent the current approach shared by the contract appeals boards to the application of the *Christian* doctrine to contract performance disputes. If a statute[62] or published regulation requires a certain clause to be included in a specific contract, the particular board will deem that clause a part of that contract. Either the government or the contractor may invoke the doctrine;[63] moreover, a board will apply the doctrine even if the contract clearly reflects that the parties erroneously agreed to excise the necessary clause.[64] The boards also will apply *Christian* doctrine to eliminate clauses that the parties erroneously included in contracts in violation of federal contracting regulations,[65] and then to incorporate the correct clauses into the contracts.[66] The doctrine even may be applied to "incorporate" regulations into a contract[67]—an act that further underscores its broad potential reach.

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[56] ASBCA No. 35,558, 88-3 BCA ¶ 20,872.

[57] *See* FAR 52.229-3.

[58] *See* FAR 52.229-2.

[59] *See* FAR 52.229-2(c). The federal government uses this information to seek a refund of the taxes from the North Carolina Commissioner of Revenue. The federal government retains these monies; they are not further refunded to the contractor. *See* Harry Pepper & Assoc., 88-3 BCA at 105,544.

[60] Harry Pepper & Assoc., 88-3 BCA at 105,544.

[61] *Id.*

[62] *See, e.g.*, Mark Smith Constr. Co., DOT CAB No. 2044, 90-1 BCA ¶ 22,445 (holding that the Davis-Bacon Act required incorporation of withholding of funds clause); BUI Constr. Co. & Bldg. Supply, ASBCA No. 28,707, 84-1 BCA ¶ 17,183 (citing *Christian* to hold that "[i]t is well settled that if a statute requires inclusion of a contract provision, such provision will be read into the contract by operation of law, and is binding on the parties even if [it is] omitted from the contract terms").

[63] Joseph Penner, GSBCA No. 4647, 80-2 BCA ¶ 14,604.

[64] *See, e.g.*, Pyronauts, Inc., ENG BCA No. 4070, 78-2 BCA ¶ 13,413 (contracting officer, by placing "check marks" in various blocks on purchase order, deleted required disputes clause from contract; disputes clause incorporated under *Christian* doctrine despite its express deletion).

[65] *See* Charles Beseler Co., ASBCA No. 22,669, 78-2 BCA ¶ 13,483 (holding value engineering incentive clause invalid and unenforceable because not authorized in commercial items contracts of that type).

[66] *See* Spectrum Am. Contractors, ASBCA No. 33,039, 87-2 BCA ¶ 19,864 (invoking *Christian* to substitute valid 1984 version of labor standards provisions for invalid 1977 version incorporated).

[67] *See, e.g.*, De Matteo Constr. Co. v. United States, 600 F.2d 1384, 1391 (Ct. Cl. 1979) (citing *Christian* to incorporate Postal Service regulations into contract). The court stated that because these regulations were "issued pursuant to statutory authority ..., they have the force and effect of law ..." and reasoned that, "if they are applicable, they must be deemed terms of the contract even though not specifically set out therein." *Id.*

The Relevance of *Christian* in Bid Protests

As the importance of the *Christian* doctrine in the resolution of contract performance disputes has increased, bidders and government counsel have sought to invoke *Christian* in bid protest cases as well. A bid protest case typically arises when a disappointed bidder claims that a contract solicitation was fatally defective because it did not contain a required clause and the bidder contends that the government must resolicit the contract. The government normally responds by arguing that *Christian* incorporates the omitted clause into the solicitation and that the solicitation, therefore, is not defective.

In bid protests, however, the legal focus is different from the focus in performance disputes. Bid protests do not concern disputes between two parties. Rather, they address the effects of alleged government errors on competitions involving multiple bidders.[68] Because solicitations should promote competition between many parties while ensuring that the government's needs are satisfied, the Comptroller General's treatment of *Christian* issues in bid protests necessarily differs from the approach adopted by the boards of contract appeals.

This disparity in focus originally appeared in a 1968 Comptroller General decision[69] resolving a case in which the government mistakenly had omitted a required "all or none" bid limitation clause from a solicitation to manufacture steel punches. Under this clause, the government could award the contract only to a bidder whose bid was low on every item listed in the solicitation. Eighteen companies submitted competing bids and federal officials evaluated each bid under the terms of the omitted clause. After the government awarded the contract, an unsuccessful bidder challenged the award. It claimed that the bid evaluation had been improper because the limitation on "all or none" bids had not appeared in the solicitation. In response, the government argued that the Comptroller General should apply *Christian* to incorporate the omitted clause into the solicitation because General Services Administration Procurement Regulation (GSPR) 5-2.407-50(b) expressly required that the solicitation include this clause. The Comptroller General, however, declined to incorporate the clause, holding that the omission "could have misled [the protestor],"[70] and that "the [government's] failure to comply with the GSPR [had] created an ambiguity [that] cast[] serious doubt on the validity of the solicitation and the resulting contracts."[71] Nevertheless, in the very next sentence, the Comptroller General expressed an opinion that remains controlling to the present day, stating:

> [S]ince the record indicates that the three contractors, which were awarded the items in question, have already delivered some of the required steel punches and, in anticipation of receipt of future orders, have already manufactured a substantial number of steel punches, we do not feel that cancellation of the contracts involved at this time would be in the best interests of the Government.[72]

This opinion captures the Comptroller General's approach in a nutshell. Instead of mechanically invoking *Christian* to incorporate the omitted clause, the Comptroller General considered whether the omission of the essential clause actually prejudiced the bidders and whether this prejudice affected the validity of the solicitation. Having found that the omission affected the validity of the solicitation, the Comptroller General then balanced the detrimental effect on the scope of competition against countervailing governmental interests to decide whether resolicitation was necessary.

In *Linda Vista Industries*,[73] a federal agency issued a solicitation without the required value engineering clause. After the agency awarded the contract to the low bidder, Linda Vista Industries protested, arguing that the omission of the clause had rendered the solicitation fatally defective. The Government attempted to invoke *Christian*, but the Comptroller General declined to permit this. He stated, however, that although he felt "no doubt that the solicitation was defective since it did omit a mandatory clause ... no evidence [suggested] that [the solicitation had failed to achieve] full and free competition ..., that any of the bidders ... [had been] prejudiced by the omission of the clause[,] or that the actual needs of the government ... [would] not be served."[74] Accordingly, the Comptroller General did not order the agency to cancel and reissue the solicitation.

The Comptroller General's approaches to *Christian* have consisted of a functional analysis of the policies that underlie the doctrine: fairness and equity concerns—

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[68] *See, e.g.*, Comp. Gen. Dec. B-220139 (24 Dec. 1985), 85-2 CPD ¶ 710 (addressing "the effect of the omission of the [insurance—work on a government installation] clause on the competition").

[69] 47 Comp. Gen. 682 (1968).

[70] *Id.* at 685.

[71] *Id.* at 686.

[72] *Id.*

[73] Comp. Gen. Dec. B-214447 (2 Oct. 1984), 84-2 CPD ¶ 380.

[74] *Id.* at 4.

addressed in determination of actual prejudice—and the desire to advance important procurement policies—addressed in the evaluation of harm to the competition and of the importance of the government's needs. This workable, rational use of *Christian* comports well with public policy even though it does not result in the actual incorporation of omitted contract clauses.[75]

Clouds on the Horizon: Using *Christian* to Incorporate Discretionary Contract Clauses

The above discussion shows that the boards of contract appeals have invoked the *Christian* doctrine freely to incorporate required clauses into contracts from which they have been omitted. On the other hand, the Comptroller General, whose objective is to maximize competition in the bidding process, normally has declined to incorporate mandatory clauses into contract solicitations. If these contrasting approaches marked the limits of the *Christian* doctrine, government contracting personnel would face a system that, while arguably inappropriate in some situations, is nonetheless fairly consistent and predictable. The boards of contract appeals, however, have begun to weave a new and different thread into the fabric of the *Christian* doctrine by applying *Christian* to incorporate discretionary contract clauses. Although the final pattern of the boards' handiwork has yet to emerge, this development poses a potential danger of which contracting personnel must be aware.

The boards' applications of *Christian* to discretionary contract clauses can be traced back to the 1972 ASBCA decision of *Muncie Gear Works, Inc.*[76] In that case, the contracting officer had omitted a duty-free entry—Canadian supplies clause from a fixed-price supply contract. As a result, the contractor had to pay duties amounting to $17,304 on supplies that it had purchased in Canada. The contractor argued that the omitted clause should have been included in the contract, and asked the Board to incorporate it under *Christian*. The Board responded that "[t]he *Christian* case does not require the incorporation of a clause whose applicability is based on the exercise of judgment or discretion."[77] Nevertheless, it then examined the reasonableness of the contracting officer's decision to omit the clause from the contract. Finding a "reasonable basis for a belief that the end items would contain no Canadian parts,"[78] the Board declined to incorporate the clause into the contract.

In the 1980 decision of *Guard-All of America*,[79] the Board again examined a contracting officer's discretionary choice of contract clauses. In this case, however, the result was quite different. The *Guard-All of America* dispute arose when the government terminated for convenience a fixed-price contract for security services. The contract for these services included a "short-form" termination for convenience clause that federal agencies must include in contracts when they "reasonably [have] determined that termination for convenience would not result in a claim for anything but the services rendered."[80]

The agency terminated the one-year contract for convenience only three months after the contractor began performance. The contractor asked the government to reimburse it for the "large sums of money for uniforms, vehicles, [and] weapons"[81] it had expended in anticipa-

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[75] For additional General Accounting Office (GAO) opinions dealing with *Christian*, see Comp. Gen. Dec. B-225437 (11 Mar. 1987), 87-1 CPD ¶ 274, at 2 (upholding agency's cancellation of solicitation after recognizing that the omission of a required clause created "a clear possibility of prejudice to bidders"); 63 Comp. Gen. 452, 454 (1984) (explaining why "[t]he *Christian* Doctrine has never been extended to include the incorporation of mandatory contract provisions into an [invitation for bid] ... when they have been inadvertently omitted"); Comp. Gen. Dec. B-204316 (23 Mar. 1982), 82-1 CPD ¶ 273, at 2-3 (noting that "the so-called '*Christian* Doctrine' is limited to incorporation of mandatory contract clauses into an otherwise validly awarded Government contract and does not stand for the proposition that mandatory provisions may or should be incorporated into an IFB").

Although most bid protests are lodged with the Comptroller General, the GAO is not the only forum in which these protests can be litigated. The Claims Court, by virtue of 28 U.S.C. § 1491(a)(3) (1988), may assert preaward equitable jurisdiction grounded upon the government's implied contractual duty "fully and fairly [to] consider all bids[,] which duty arises when the government issues an IFB and a bidder responds thereto with a responsive conforming bid." Sterlingwear of Boston, Inc. v. United States, 11 Cl. Ct. 517, 521 (1987). The Claims Court's preaward jurisdiction allows it to enjoin an award if the procuring agency omits a mandatory clause from a solicitation. *See* A.C. Seeman, Inc. v. United States, 5 Cl. Ct. 386, 388 (1984). Under this approach, the court will deem properly published agency regulations that pertain to the bidding process to be incorporated under *Christian* into the implied contract to ensure that the government evaluates bids fairly. Violations of these regulations can breach this implied duty. *See id.*; *see also* ATL Inc. v. United States, 3 Cl. Ct. 52, 55 (1983) (citing *Christian* to incorporate ASPR 1-705.4(c)(6), which empowers federal agencies to reject bids without Small Business Administration responsibility review when the bidder has been debarred, as a "term of that [implied] contract ... to which plaintiff must be deemed to have agreed").

[76] ASBCA No. 16,153, 72-1 BCA ¶ 9429.

[77] *Id.* at 43,794.

[78] *Id.*

[79] ASBCA No. 22,167, 80-2 BCA ¶ 14,462.

[80] ASPR 7-1902.16(b).

[81] Guard-All of Am., 80-2 BCA at 71,297.

tion of the entire performance period. The contracting officer refused, asserting that the contractor had incurred these costs for purposes other than "services rendered" and, therefore, was not entitled to compensation under the short-form termination clause in the contract. The contractor appealed.

The ASBCA found that the contracting officer knew, or reasonably should have known,[82] that the agency would terminate the contract early. Therefore, the contract should have contained the "long-form" termination clause, under which the contractor would have received compensation for most of its expenses.[83] Deeming the contracting officer's choice of the "short-form" clause instead of the "long-form" clause an abuse of discretion, the Board invoked the *Christian* doctrine to delete the inappropriate clause and incorporate the proper clause, thereby entitling the contractor to the relief it had requested.[84]

Within the past two years, two other board decisions substituted long-form termination clauses for short-form clauses on an "abuse of discretion" rationale.[85] Moreover, the Court of Claims has used *Christian* in a similar manner to replace an unreasonably low termination settlement ceiling with a more reasonable one.[86]

Although *Guard-All of America* and its progeny certainly achieved fair results, they raise significant questions. Although these decisions, to date, have been limited to the situations noted above, by their logic they could apply to any case in which a contracting officer has abused his or her discretion by choosing one clause instead of another. Assume, for example, that a contracting officer had to decide whether to include in a contract the Federal Acquisition Regulation (FAR) standard disputes clause[87] or the FAR alternate I disputes clause.[88] According to guidance in the FAR, the contracting officer should use the standard clause, unless "it is determined under agency procedures ... that continued performance is necessary pending resolution of any claim arising under *or relating to* the contract."[89] The distinction between the two versions of the disputes clause is important. The government may require a contractor to continue performance pending resolution of a dispute "relating to" a contract only if the contract at issue contains the alternate I clause.[90] Under *Guard-All of America*, however, if a contractor stayed performance, pending the resolution of a dispute that related to a contract containing the alternate I clause, it could defend against a later government claim for default-related reprocurement costs by arguing that the contracting officer should have used the standard disputes clause instead of the alternate I version. This is but one example of the myriad discretionary clause inclusion decisions that exist in the current FAR. Whether courts and boards will assess the reasonableness of these decisions in the future remains to be seen.

Conclusion and Recommendations

In 1963, the Court of Claims added a new and potent weapon to its contract dispute resolution arsenal. Through judicial legerdemain, the *Christian* court first made required contract clauses "appear" in contracts in which they had not appeared before, then resolved disputes as if those clauses had been there all along. Firmly rooted in equity and the national interest, *Christian* was a decision that, at the very least, achieved a fair result.

For over a decade after its conception, the courts and boards treated the *Christian* doctrine the same way grade-school students might treat a romantic fantasy: they discussed it frequently, but never applied it in practice. After a few contract appeals boards invoked the doctrine, however, they decided that they liked it. They began to apply it more often. Eventually, this increasing application of the doctrine led to some quite un*Christian* acts as the boards ceased to rely on the policies upon which the doctrine was grounded.

Successive comptrollers general, however, have kept the doctrine in its proper perspective. They have applied it wisely, using it not to inject unbargained-for contract clauses into solicitations, but rather as a means to achieve an honorable end—that is, to maximize competition and to satisfy the government's needs.

The Comptroller General's colleagues in the Claims Court and the boards of contract appeals have not been so wise. Not satisfied with invoking the doctrine merely to incorporate mandatory clauses, they have manipulated it to incorporate discretionary clauses as well. Although

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[82] The Board went so far as to impute knowledge of Government Service Administration employees to the Army contracting officer. *See id.* at 71,300-01.

[83] *Id.*

[84] *Id.* at 71,301-02.

[85] *See* DWS, Inc., ASBCA No. 29,865, 90-2 BCA ¶ 22,696; Carrier Corp., GSBCA No. 8516, 90-1 BCA ¶ 22,409.

[86] *See* Applied Devices Corp. v. United States, 591 F.2d 635 (1979).

[87] FAR 52.233-1.

[88] *Id.* (alternate I).

[89] *Id.* (emphasis added).

[90] *Id.*

these manipulations have achieved fair results so far, the danger remains that, like the doctrine itself, this just practice could evolve into something much less benign.

The time is ripe for courts and boards to reexamine the *Christian* doctrine. *Christian* is entirely a creation of the courts—it is not mandated by statute or regulation. It best can be reevaluated and, if necessary, modified in that arena. Alternatively, congressional or agency policymakers could rein this judicial runaway by promulgating meaningful standards to restrain its application. These restrictions would be especially appropriate when applying the doctrine would create legal duties for parties who lacked actual knowledge of these duties when they entered into the contract.[91]

Until this reevaluation occurs, litigators in the government contracts arena must be aware of the power of the doctrine. They should press for a return to *Christian* values in individual cases whenever the policies that support the doctrine appear persuasive. They must be resolute, because a doctrine that has taken twenty-eight years to mature cannot be transformed in a fortnight.

Government contracting personnel should take care to include all required clauses in contracts and, when choosing discretionary clauses, should document—or at least should analyze carefully—their reasons for inserting "clause *A*" into a contract instead of "clause *B*." Above all, they must understand the power of the doctrine, lest they be caught unaware when a smiling contractor submits an unexpected claim to which a highlighted copy of the *Christian* decision is attached.

[91] For example, if a contractor could show that it had submitted its bid without knowing of the duties that would be imposed by an omitted mandatory contract clause, it could claim an equitable adjustment for the increased costs of performing those duties. The contractor could make this showing by presenting its bid preparation documents and other relevant evidence. Some government contracting personnel might object to this approach because it might reduce a contractor's incentive to compare the clauses in a solicitation with the clauses required by the FAR. This objection is not without merit; however, it fails to address the important underlying issue—who should bear the burden of the government's failure to issue a complete solicitation? Conceptually, the government should bear the burden because without the government's negligence the *Christian* issue never would have arisen. Additionally, the government would not "lose out" under this approach; it only would be denied an arguably undeserved benefit. *See* text accompanying notes 57-63.

The Continued Viability of Peremptory Challenges In Courts-Martial

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Introduction

The peremptory challenge has been part of American jurisprudence for more than 200 years and of the common law for several additional centuries.[1] Commentators and jurists have described it "as one means of assuring the selection of a qualified and unbiased jury."[2] Indeed, although this challenge is not constitutionally required,[3] American courts have identified the use of peremptory challenges as one of the most important rights in our system of justice.[4] To deny or improperly to impair an accused's right to exercise a peremptory challenge constitutes reversible error without even a showing of prejudice by the accused.[5]

In military practice, the peremptory challenge is of more recent vintage. Before 1920 the military did not recognize the peremptory challenge at all.[6] Current military

[1] Batson v. Kentucky, 476 U.S. 79, 112, (1986) (Burger, C.J., dissenting). At common law, the accused's right to a peremptory challenge was limited to felony cases. *See* Ronald. A. Anderson, 5 Wharton's Criminal Law and Procedure § 1991 (1957).

[2] *Batson*, 476 U.S. at 91; *see also id.* at 120 (Burger, C.J., dissenting).

[3] *Id.* at 91; *id.* at 108 (Marshall, J., concurring); *see also* Ross v. Oklahoma, 487 U.S. 81 (1988); Swain v. Alabama, 380 U.S. 202, 219 (1965); Stilson v. United States, 250 U.S. 583, 586 (1919).

[4] *Batson*, 476 U.S. at 121 (Burger, C.J., dissenting) (citing *Swain*, 380 U.S. at 219; Pointer v. United States, 151 U.S. 396, 408 (1894)).

[5] *Swain*, 380 U.S. at 202.

[6] *Compare* Articles of War of 1920, art. 18, Act of June 4, 1920, Pub. L. 66-242, 41 Stat. 759, 787 (1920) ("the accused and the trial judge advocate .... [e]ach ...shall be entitled to one peremptory challenge ....") *with* Articles of War of 1916, art. 18, Act of Aug. 29, 1916, Pub. L. 64-242, 39 Stat. 619, 653 (1916) ("Members of a general or special court-martial may be challenged by the accused, but only for cause stated to the court."). *See generally* Manual for Courts-Martial, United States, 1921. Colonel William Winthrop noted that peremptory challenges "were not formally sanctioned by usage, and are now precluded by statute: in the American military code only challenges for legal cause have ever been permitted." William W. Winthrop, Military Law and Precedents 206 (2d ed. 1896) (footnotes omitted).

law provides that "[e]ach accused and the trial counsel is entitled to one peremptory challenge ...."[7]

A party's authority to exercise peremptory challenges was largely unrestricted until *Batson v. Kentucky*.[8] In *Batson*, however, the Supreme Court effectively opened Pandora's box by empowering criminal defendants to contest prosecutors' uses of peremptory challenges on jurors of the same racial minority as the accused. The United States Court of Military Appeals later applied *Batson* to trials by courts-martial.[9] This article examines *Batson*, the Supreme Court decisions that followed it, their military progeny, and the continued viability of the peremptory challenge in courts-martial. It suggests that the Supreme Court eventually will eliminate the peremptory challenge from civilian trial practice and that the Court of Military Appeals likely will follow suit with respect to courts-martial.

The Cases

The State of Kentucky indicted James Kirkland Batson, a black man, on charges of burglary and receiving stolen goods. At trial, the prosecutor used his peremptory challenges to strike all four blacks from the venire. The defense moved to discharge the jury, claiming the prosecutor's removal of the black jurors violated the accused's right under the Sixth and Fourteenth Amendments to a jury drawn from a cross-section of the community and his right under the Fourteenth Amendment to equal protection of the law. The trial judge denied the motion without hearing. The all-white jury convicted Batson of both charges.[10]

On appeal before the United States Supreme Court, Batson abandoned his equal protection argument and relied solely on the Sixth Amendment.[11] Nevertheless, the Court looked to the Fourteenth Amendment when it analyzed Batson's appeal, holding in a seven-to-two decision that the Equal Protection Clause forbade the prosecutor "to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[12] The Court further held that a defendant may establish a prima facie case of purposeful discrimination in the selection of the petit jury by showing that the defendant is "a member of a cognizable racial group," that "the prosecutor ... exercised peremptory challenges to remove from the venire members of the defendant's race," and "that these facts and ... other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."[13] The Court added that "[o]nce the defendant makes ... [this] prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors."[14]

Despite the differences between civilian and military court jury selection and challenge procedures, two years later the Court of Military Appeals held in *United States v. Santiago-Davila*[15] that the *Batson* decision applies to courts-martial under the Due Process Clause of the Fifth Amendment.[16] The Government had contended that *Batson* was inapplicable to the instant case because the Uniform Code of Military Justice (UCMJ) limits military trial counsel to one challenge and because the trial counsel had left a member of the accused's racial group on the panel. The court dismissed these arguments, pointedly remarking, "[W]e do not believe it decisive that a prosecutor runs out of his [or her] peremptory challenges before he [or she] can exclude all the members of a particular group."[17] The court ruled that the defense may try to establish a prima facie case of purposeful discrimination whenever a trial counsel has exercised a peremptory challenge to exclude a member of the accused's racial minority group.

In his concurring opinion,[18] Judge Cox proposed that the court adopt a per se rule, which the Army Court of Military Review previously had articulated in *United States v. Moore*,[19] that would absolve the defense of the

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[7]Uniform Code of Military Justice art. 41(b), 10 U.S.C. § 841(b) (1988) *as amended by* Act of Nov. 5, 1990, 10 U.S.C.A § 841(b) (West Supp. 1991) [hereinafter UCMJ].

[8]476 U.S. 79 (1986).

[9]United States v. Santiago-Davila, 26 M.J. 380 (C.M.A. 1988).

[10]*Batson*, 476 U.S. at 82-83.

[11]*Id.* at 108-09 (Stevens, J., concurring). Batson also had dropped his Fourteenth Amendment claim from his argument before the Kentucky Supreme Court. *Id.* at 83, (Burger, C.J., dissenting). The defense probably abandoned the Fourteenth Amendment claim because the Supreme Court previously had rejected a similar claim that an accused could establish a violation of equal protection solely by showing the prosecutor's peremptory challenges. *See* Swain v. Alabama, 380 U.S. 202 (1965).

[12]*Batson*, 476 U.S. at 89.

[13]*Id.* at 96.

[14]*Id.* at 97.

[15]26 M.J. 380 (C.M.A. 1988).

[16]*Id.* at 390 (citing Frontiero v. Richardson, 411 U.S. 677 (1973); Bolling v. Sharpe, 347 U.S. 497 (1954)).

[17]*Id.* at 391.

[18]*Id.* at 393 (Cox, J., concurring).

[19]26 M.J. 692 (A.C.M.R. 1988).

burden of making a prima facie showing of purposeful discrimination. Judge Cox would have required the trial counsel, upon timely objection by the defense, to provide a racially neutral reason for any peremptory challenge that he or she had exercised against a member of the accused's race.[20] The Court of Military Appeals ultimately adopted this rule for all military courts when it upheld the Army court's ruling in *Moore*.[21] The court recommended that, if an accused challenged the prosecutor's use of a peremptory challenge under the *Batson-Moore* standard, the military judge should permit the trial counsel to state his or her reasons for the challenge. After argument by the defense, the judge then would "determine whether [the] trial counsel [had] articulated a neutral explanation relative to this particular case, giving a clear and reasonably specific explanation of the [trial counsel's] legitimate reasons to challenge this member."[22]

No one expected *Batson* and *Moore* to be the final words on restricting the exercise of peremptory challenges—they leave too many questions unanswered. Does the Constitution impose any limit on the exercise of peremptory challenges by the defense counsel? Does the *Batson-Moore* rule apply to nonracial groups that have enjoyed special treatment in the past under the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment? Classic equal protection analysis suggests that *Batson* should apply to any exclusion based on "sex, age, religious or political affiliation, mental capacity, number of children, living arrangements, ...[or] employment in a particular industry or profession."[23] To give one obvious example, gender-based peremptory challenges surely "touch the entire community"[24] and "undermine public confidence in the fairness of our system of justice"[25] to the same extent as do challenges based on race.

The Supreme Court did not take long to expound on the *Batson* rule, although it did so rather narrowly. In *Alabama v. Cox*[26] the Court declined to decide whether *Batson* applies to an accused's use of peremptory challenges. In *Holland v. Illinois*[27] the Court, in a five-to-four decision, found that a prosecutor's racially motivated challenge of black jurors did not violate a white defendant's Sixth Amendment right to trial by an impartial jury. At least five justices, however, suggested that, despite language in *Batson* requiring racial identity between the defendant and the excluded juror, Holland successfully could have appealed the potential juror's exclusion under the Equal Protection Clause of the Fourteenth Amendment.[28]

The Supreme Court recently decided the appeal of Larry Joe Powers, a white man that the State of Ohio had indicted on two counts of aggravated murder and one count of attempted aggravated murder.[29] At trial, the prosecutor had exercised ten peremptory challenges—seven against blacks. Citing *Batson*, the defendant challenged the prosecution's challenges of the black potential jurors and asked the court to make the prosecutor explain the basis for each challenge. The court overruled the objection.[30]

The record of trial was deficient. It did "not indicate that race was somehow implicated in the crime of the trial; nor [did] it reveal whether any black person sat on [the] petitioner's petit jury or if any of the nine jurors [that] the petitioner [had] excused by peremptory challenges were black persons."[31] Nevertheless, in a seven-to-two decision the Supreme Court overturned Power's conviction. The Court held that "the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenge to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race ...."[32] In so ruling, the Court apparently abandoned its earlier requirement that the accused and the excused jurors share a common racial identity.[33]

More recently still, in a sweeping six to three decision,[34] the Supreme Court extended *Batson* to peremptory challenges exercised in civil litigation. The Court

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[20] *Santiago-Davila*, 26 M.J. at 393 (Cox, J., concurring).

[21] *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989).

[22] *Id.* at 369. While the opinion suggests that a prosecutor's explanation for the challenge "must relate to this particular case," the court later accepted a trial counsel's explanation that he had based a peremptory challenge on the excluded court member's previous record as a commander. *See* United States v. Cooper, 30 M.J. 201, 202-03 (C.M.A. 1990).

[23] *Batson*, 476 U.S. at 124 (Burger, C.J., dissenting) (citations omitted).

[24] *Id.* at 87.

[25] *Id.*

[26] 488 U.S. 1018 (1989) (denying certiorari).

[27] 493 U.S. 474 (1990).

[28] *Id.* The Supreme Court refused to overlook Holland's failure to raise the equal protection argument. *Id.* In *Batson*, however, the Court had based its decision on the Equal Protection clause despite the accused's abandonment of the claim on appeal.

[29] Powers v. Ohio, 111 S. Ct. 1364 (1991).

[30] The jury subsequently convicted Powers and sentenced him to 53 years in prison. *Id.* at 1366.

[31] *Id.*

[32] *Id.* at 1370.

[33] *Id.* at 1366.

[34] Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991).

acknowledged that "[r]acial discrimination, though invidious in all contexts, violates the Constitution only when it may be attributed to state action."[35] It emphasized, however, that by participating in jury selection, private litigants "serve an important function with the government and act with its substantial assistance."[36] The Court concluded that government authority dominates the jury trial system to such an extent "that its participants must be deemed to act with the authority of the government and, as a result, [must] be subject to constitutional constraints."[37]

Analysis of the Cases

The *Batson* decision represents a logical extension of the Supreme Court's efforts over the past 100 years to eradicate racial discrimination in the selection of court members.[38] It expresses the compelling axiom that

> [t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.[39]

Clearly the Supreme Court was justified in condemning the routine practice, favored by some prosecutors, of eliminating all blacks from a petit jury through the exercise of peremptory challenges. Likewise, the Court of Military Appeals' reasons for adopting *Batson* appear sound. If the *Batson* rule applies to the states under the Equal Protection Clause of the Fourteenth Amendment, it should apply to military prosecutors under the Due Process Clause of the Fifth Amendment, unless expressly or by necessary implication made inapplicable.[40] As Chief Judge Everett remarked,

> [E]ven if we were not bound by *Batson*, the principle it espouses should be followed in the administration of military justice. In our American society, the Armed Services have been a leader [sic] in eradicating racial discrimination. With this history in mind, we are sure that Congress never intended to condone the use of a government peremptory challenge for the purpose of excluding a "cognizable racial group."[41]

The per se rule that the Court of Military Appeals adopted in *Moore* is eminently well-founded insofar as it saves time in a *Batson* inquiry, simplifies the judicial process, and adds to the appearance of fairness to the accused. Can one truly say, however, that the per se rule will assist courts-martial to achieve the goals that the Supreme Court envisioned in *Batson*? I think not.

Civilian jurisdictions must draw their venire from a cross section of the community.[42] They normally select their potential jurors randomly, using voting registration lists, lists of licensed drivers, telephone directories, or similar aids. The prosecuting agency exerts no significant influence on the composition of the venire. A prosecutor thus can expect the racial composition of the venire to approximate the racial composition of the community as a whole. He or she can eliminate members of a particular race from a petit jury only through the exercise of peremptory challenges. *Batson* properly limits a prosecutor's ability to exercise peremptory challenges in this manner. Were the Supreme Court to adopt a per se rule for civilian courts, as has the Court of Military Appeals for military practice, this rule would not detract from *Batson*'s rightful goals.

In the military, however, the selection of court members does not follow civilian practice. The convening authority that refers a case to trial personally must select for the court "such members of the armed forces as, in his [or her] opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[43] A member of the convening authority's legal staff usually assembles a list of personnel available to serve as court members. Although the convening authority is not limited to this pool of prospects, he or she ordinarily will select the "venire" from the list.

Because of these differences in selection procedures, the *Moore* per se rule will not necessarily promote the goals of *Batson* in military practice. The knowledge that *Moore* may compromise a trial counsel's ability to freely

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[35] *Id.* at 2082.

[36] *Id.* at 2087.

[37] *Id.* at 2082.

[38] *See* Strauder v. West Virginia, 100 U.S. 303 (1880) (holding that racial discrimination in the selection of venire from which a petit jury is drawn violates the Fourteenth Amendment).

[39] *Batson*, 476 U.S. at 87.

[40] *See Santiago-Davila*, 26 M.J. at 389-90; United States v. Ezell, 6 M.J. 307, 313 (C.M.A. 1979). In *Edmonson*, the Supreme Court applied *Batson* under the Due Process Clause of the Fifth Amendment. 111 S. Ct. 2077.

[41] *Santiago-Davila*, 26 M.J. at 390.

[42] *Strauder*, 100 U.S. at 303.

[43] UCMJ art. 25(d)(2).

exercise his or her peremptory challenge sends a subtle message to the staff judge advocate not to list, and to the convening authority not to select, members of cognizable racial groups for court-martial duty. Although they presumably would not condone active racial discrimination, neither would the staff judge advocate or the convening authority want to tie the hands of their prosecutor.[44]

The *Powers* decision is a logical extension of *Batson*. After all, in *Batson* the Court emphasized that a peremptory challenge that is based solely on a potential juror's race harms both the excluded juror and the entire community by undermining public confidence in the fairness of the judicial system.[45] To forestall this harm—and to remedy the harm the Government already had caused in *Powers*—the Court had little choice but to grant all defendants, whatever their race, standing to contest a prosecutor's racially motivated peremptory challenges.

The *Edmonson* decision is not as easily reconciled with prior case law as is *Powers*.[46] Never before had a state or federal high court expressly held the conduct of a private litigant in a civil trial to be a governmental action subject to the rigors of equal protection analysis. *Edmonson*'s sweeping language, however, hints at even further change. The Court remarked that

> the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself....
>
> Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality.[47]

The Court's application of *Batson* to civil defendants, read together with the words quoted above, can lead to but one conclusion: The Court eventually will interpret *Batson* to restrict criminal defendants' exercise of peremptory challenges.[48]

Another significant issue that appellate courts will have to resolve is the breadth of the term "cognizable racial group." While *Batson* and its Supreme Court progeny all are cases in which the challenged court member was black, the Court's holdings apparently apply to any prosecutorial challenge exercised to exclude a juror because of his or her race or ethnicity. Indeed, several lower federal appellate courts have applied *Batson* to a wide range of ethnic groups, including Native Americans,[49] Jews,[50] Mexican-Americans,[51] and Italian-Americans.[52] Some have applied *Batson* to the systematic exclusion of white jurors when the main witness was black[53] or when a white defendant faced trial in a venue in which the venire was predominantly black.[54] One federal appellate court even found that the *Batson* proscriptions encompassed the systematic exclusion of men because of their gender—despite language in *Batson* that seems to limit it to discrimination against specific ethnic groups.[55]

The end result of the *Batson* line of cases would appear to be endless litigation at both the trial and appellate levels—especially in the military courts, where the *Moore* per se rule controls. If, over time, the Supreme Court applies *Batson* as widely as have the courts of appeal, a diligent trial counsel or trial defense counsel conceivably could invoke *Batson* to contest every peremptory an opposing party might exercise. As Justice Scalia cogently observed, *Edmonson* adds

> yet another complexity ... to an increasingly Byzantine system of justice that devotes more and more of its energy to sideshows and less and less to the merits of the case. Judging by the number of *Batson* claims that have made their way even as far as this Court under the pre-*Powers* regime, it is a certainty that the amount of judges' and lawyers' time devoted to implementing today's newly discovered Law of the Land will be enormous.[56]

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[44] Judge Cox suggests that the trial counsel should credit the convening authority with selecting court members wisely under the criteria of UCMJ article 25(d)(2), "by not challenging members of an accused's race peremptorily unless there is a good reason to do so." *Santiago-Davila*, 26 M.J. at 393 (Cox, J., concurring). Although Judge Cox recognizes that the power to appoint members of the court gives the convening authority "the functional equivalent of an unlimited number of peremptory challenges," in past opinions he has failed to analyze how limiting the trial counsel's peremptory challenge might affect the convening authority's appointment of the court. *See, e.g.*, United States v. Carter, 25 M.J. 471, 478 (C.M.A. 1988) (Cox, J., concurring).

[45] *Batson*, 476 U.S. 87.

[46] *Edmonson*, 111 S. Ct. at 2089 (O'Connor, J., dissenting).

[47] *Id.* at 2087.

[48] *Id.* at 2095 (Scalia, J., dissenting); *Batson*, 476 U.S. at 126 (Burger, C.J., dissenting); *see* United States v. DeGross, 913 F.2d 1417 (9th Cir. 1990), *reh'g en banc granted* 930 F.2d 695 (9th Cir. 1991).

[49] United States v. Iron Moccasin, 878 F.2d 226 (8th Cir. 1989).

[50] United States v. Gelb, 881 F.2d 1155 (2d Cir. 1989).

[51] United States v. Romero-Reyna, 867 F.2d 834 (5th Cir. 1989).

[52] United States v. Biaggi, 853 F.2d 89 (2d Cir. 1988).

[53] Roman v. Abrams, 822 F.2d 214 (2d Cir. 1987).

[54] Virgin Islands v. Forte, 865 F.2d 59 (3d Cir. 1989).

[55] *DeGross*, 913 F.2d at 1417.

[56] *Edmonson*, 111 S. Ct. at 2096 (Scalia, J., dissenting).

As the volume of *Batson*-inspired litigation increases, another issue will become more and more urgent. How is a trial judge to assess the motives of counsel that exercise peremptory challenges? Justice Marshall, in his concurring opinion in *Batson*, anticipated these difficulties:

> Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, or seemed "uncommunicative," or "never cracked a smile" and, therefore "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case." If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.[57]

A wealth of decisions since have confirmed Justice Marshall's fears. In *United States v. Romero-Reyna*[58] the prosecutor used all six challenges to strike Mexican-Americans. The prosecutor claimed to have struck the first potential juror for being single and a motel employee; the second for being a pipeline operator—"I have a P rule, I never accept anyone whose occupation begins with a P"; the third for being young, divorced, and a community service aide; the fourth for being young, single and a participant in a college work study program; the fifth for being single; and the sixth for being elderly and a participant in a meal program.[59] In *United States v. Moreno*[60] the prosecutor used all six of his peremptory challenges against minority jurors.[61] The trial judge accepted as race-neutral the prosecutor's explanation that he had excused three members because they were young, single, unemployed, and inexperienced.[62] The judge also accepted a challenge based on the prosecutor's "gut reaction" that another potential juror's occupation as a commercial artist would cause him to sympathize with a defendant accused of drug-related offenses.[63] In *United States v. Thompson*[64] the prosecutor used all four peremptory challenges against blacks.[65] The trial judge accepted as race-neutral the prosecutor's explanations that one potential juror was a social worker, that another had glared at the prosecutor and had made him feel uncomfortable, and that a third lived in the accused's neighborhood and had worn jeans to court.[66] To apply *Batson* to the defense surely would compound the trial judge's difficulties in properly evaluating peremptory challenges of minority venirepersons.

A military judge's decision may be even more difficult than that of his or her civilian counterpart. Because court members commonly are selected from the relatively small officer population of the installation at which the court-martial is to be convened, both the trial and defense counsel often know the court members by name or reputation, or on a professional basis. How is a military judge to weigh an attorney's assertion that he or she exercised a challenge because the court member is too tough, or too lenient, on crime? How should the judge respond to an attorney's claim that the attorney's previous dealings with the challenged court member make the attorney "feel uncomfortable" or—when the trial defense counsel exercises the challenge—that the accused did not like the look on the court member's face when he or she entered the court room?

Appellate courts—even the courts of military review—have recognized the difficulty of evaluating a prosecutor's reasons for exercising a peremptory challenge and have afforded great deference to the findings of trial judges.[67] An appellate court generally will not overturn a trial judge's ruling unless it was an abuse of discretion[68] or was clearly erroneous.[69]

Conclusion

While many jurists view the peremptory challenge as an essential right that must be preserved to secure a fair trial,[70] other participants in litigation, including numerous

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[57] *Batson*, 476 U.S. at 106 (Marshall, J., concurring) (citations omitted). In this passage of his opinion, Justice Marshall lists explanations accepted by appellate courts in California and Massachusetts—states that previously had adopted limitations on peremptory challenges similar to the restrictions announced in *Batson*. *See id.*

[58] 867 F.2d 834 (5th Cir. 1989).

[59] *Id.* at 837. The court of appeals remanded the case so the trial judge could make findings that he had failed to make at the original trial. *Id.* at 838.

[60] 878 F.2d 817 (5th Cir. 1989).

[61] *Id.* at 820.

[62] *Id.*

[63] *Id.* The appellate court afforded great deference to the trial judge's findings and refused to overturn the conviction. *Id.*

[64] 827 F.2d 1254 (9th Cir. 1987).

[65] *Id.* at 1256.

[66] *Id.* The appellate court remanded the case for a hearing on the government's peremptory challenges because the trial judge had permitted the prosecutor to state his reasons for the challenges *in camera*. *Id.* at 1260-61.

[67] *Moreno*, 878 F.2d at 817.

[68] United States v. Cooper, 28 M.J. 810 (A.C.M.R. 1989), *aff'd*, 30 M.J. 201 (C.M.A 1990); United States v. Chan, 30 M.J. 1028 (A.F.C.M.R. 1990).

[69] United States v. Wilson, 867 F.2d 486 (8th Cir. 1989).

[70] *See Batson*, 476 U.S. at 91; *id.* at 108 (Marshall, J., concurring); *see also* Ross v. Oklahoma, 487 U.S. 81 (1988); Swain v. Alabama, 380 U.S. 202, 219 (1965); Stilson v. United States, 250 U.S. 583, 586 (1919).

attorneys, judges, and the public at large, regard it quite differently. "'The good trial advocate starts with the proposition that the last thing he [or she] wants is a neutral, unbiased and unprejudiced jury. He [or she] wants, of course, the most biased and prejudiced jury he [or she] can possibly come up with, provided it is biased and prejudiced his [or her] way.'"[71] Prosecutors and defense attorneys alike commonly base their peremptory challenges on "seat-of-the-pants instincts,"[72] hoping to seat the jurors that they believe are most favorably disposed to their clients.

Although the Supreme Court set lofty goals in *Batson*, Justice Marshall correctly observed that the decision "will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely."[73] That the Supreme Court eventually will implement Justice Marshall's opinion appears certain.

When the Court of Military Appeals implemented its decision requiring prosecutors to justify every contested peremptory challenge of a minority member, it did not engage in a great deal of prior analysis of this decision's probable effects on the court member selection process. If the Supreme Court eliminates peremptory challenges in civilian trials, the Court of Military Appeals likely will ban their use in courts-martial as well. Indeed, it may find compelling reasons to do so. Before it takes this step, however, the court should consider carefully the differences between the selection of jurors and the selection of court members and whether a ban on peremptory challenges actually will achieve the desired results in *military* practice.

[71] David O. Stewart, *Whither Peremptories?*, A.B.A. J., July 1991, at 38, 42 (quoting Chew v. State, 527 A.2d 332 (Md. Ct. Spec. App. 1987).

[72] *Batson*, 476 U.S. at 138 (Rehnquist, J., dissenting).

[73] *Id.* at 102-103 (Marshall, J., concurring).

Muniz, Breseman, Craig, and the Right to Privacy in a Government-Owned Desk[1]

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Introduction

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.[2]

Every trial lawyer is familiar with the Fourth Amendment. Most, if not all, trial lawyers also know that the Fourth Amendment applies to service members.[3] Problems and issues still arise, however, when lawyers and judges try to resolve what these words actually mean and, more particularly, how they apply to soldiers. This article addresses one of these many issues—the soldier's right to privacy in a government-owned desk.

Consider the following hypothetical:

First Sergeant Smith receives an anonymous telephone call about Sergeant First Class Clean, one of his soldiers. The caller says that Clean uses cocaine. He also claims that Clean sold him cocaine five weeks ago, that the sale occurred in Clean's own office, and that Clean then had the drugs locked in one of his desk drawers. Sergeant Clean locks the door to his office every night. He also routinely locks his desk. Clean has one set of keys to his desk. The other set is kept in the company key box, secured by the first sergeant.

First Sergeant Smith wants to search Sergeant Clean's office and desk for cocaine. Smith's commander is not in his office, so the first sergeant calls his trial counsel, relates the above information, and asks for advice. The trial counsel tells Smith, "No problem, first sergeant. The desk is government property, so you don't need an authorization. Go ahead and search it." First Sergeant

[1] United States v. Muniz, 23 M.J. 201 (C.M.A. 1987); United States v. Breseman, 26 M.J. 398 (C.M.A. 1988); United States v. Craig, 32 M.J. 614 (A.C.M.R. 1991).

[2] U.S. Const. amend. IV.

[3] United States v. Stuckey, 10 M.J. 347, 349 (C.M.A. 1981).

Smith proceeds with the search and finds a small vial of cocaine in Sergeant Clean's desk. Is this evidence admissible at trial?

What the Courts Have Said

Law enforcement agents may search government property without a warrant or search authorization unless the person to whom the property is issued or assigned has a reasonable expectation of privacy in the property when the search is conducted.[4] To determine whether an individual has a legitimate expectation of privacy requires a two part analysis. First, the individual must have exhibited an actual, subjective expectation of privacy. Second, this expectation of privacy must be one that society is prepared to recognize as reasonable.[5]

In *United States v. Taylor*[6] the Army Court of Military Review held that the search of a government-owned desk that had not been assigned to a specific individual was not subject to the requirements of the Fourth Amendment. The accused's chain of command had placed this desk in the unit mail room for the mail clerks to use. More than one clerk regularly used the desk. Moreover, the commander had forbidden the clerks to keep personal items in the mail room without written authorization. The Army Court of Military Review properly denied Taylor's claim to a reasonable expectation of privacy in the contents of the mail room desk. It noted that he neither had exhibited a subjective expectation of privacy, nor had claimed a privacy right that society would have respected.

After *Taylor*, this privacy issue remained dormant for almost ten years. In *United States v. Muniz*[7] and *United States v. Breseman*,[8] however, the Court of Military Appeals recently struggled with the issue of a service member's right of privacy in government-owned furniture.

In *Muniz*, the appellant took leave under false pretenses. He told his wife that he was going on a temporary duty assignment, and his unit that he was going on leave to Puerto Rico, but he actually went to England to tour the countryside with a female acquaintance. While the appellant was on this clandestine trip, his daughter fell ill and needed emergency surgery. Muniz's wife asked his commander to help her to contact her husband. Unable to reach Muniz at the address he had given in his leave form, the commander decided to look in the appellant's office for several letters that he believed could lead him to the appellant. After unsuccessfully searching the unlocked drawers of Muniz's desk, the commander forced open the lock on a drawer of his credenza. In the credenza, the commander found letters bearing an address that ultimately helped him to find Muniz.[9]

Muniz subsequently was charged with the commission of a number of offenses, among them, signing a false official statement and conduct unbecoming an officer. At trial, he unsuccessfully moved to suppress the fruits of the search of his office credenza and any evidence that the Government may have obtained as a result of that search.[10] Addressing this issue on appeal, the Court of Military Appeals upheld the decisions of the trial court and the Air Force Court of Military Review. It ruled that Muniz did not have a reasonable expectation of privacy in the contents of the government-owned credenza.

The court began its analysis by observing that

> [t]he evidence ... regarding the privacy conditions in the office was ... essentially uncontroverted. Appellant, as second in command, had a separate office. This office and the credenza therein were government property. The principal purpose of the facility was to conduct military business. Though the door to the office was lockable, both the commander and the first sergeant had access to it by key. The credenza was allocated to appellant's exclusive use. It had recently arrived at the unit and had come equipped with a set of keys. Appellant had never been asked to turn in any of the keys, and no unit policy had been formulated concerning the nature of items unit members might keep in their work areas. From time to time in the course of their official duties, various staff members would enter each other's work areas, notwithstanding the absence of the occupant, to obtain work products. Appellant's office had previously been so entered, despite his absence, for such purposes. No one had ever entered his locked credenza drawers.[11]

The court then noted that the determination of whether an individual has a legitimate expectation of privacy is a

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[4]Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 314(d) [hereinafter Mil. R. Evid.].

[5]United States v. Portt, 21 M.J. 333, 335 (C.M.A. 1986) (applying Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J. concurring) to the search of a government-owned locker).

[6]5 M.J. 669 (A.C.M.R. 1978).

[7]23 M.J. 201 (C.M.A. 1987).

[8]26 M.J. 398 (C.M.A. 1988).

[9]*Muniz*, 23 M.J. at 203.

[10]*Id.* at 202.

[11]*Id.* at 204-205.

conclusion of law.[12] The ownership of the property is a key factor in this determination, but it is not the only factor that a court must consider when determining whether the individual's expectation of privacy is reasonable. The court noted that, with respect to law-enforcement officials, a private individual can maintain a legitimate expectation of privacy in property that he or she actually does not own.[13] Concerning the ownership of the property, the Court concluded that the government's ownership of the credenza "does not automatically exclude the possibility that appellant may have acquired a legitimate expectation of privacy in its contents."[14]

The court explained that an individual normally has a much greater expectation of privacy in his or her own private property than he or she would have in the contents of property, located in his or her office, that is owned by his or her employer.[15] The court noted that in *Mancusi v. DeForte*[16] the Supreme Court had ruled that a union employee's expectation of privacy in company records that had been seized from his office had related only to the police. The Court of Military Appeals remarked that, in *Mancusi*, "[t]here was no question that the 'union higher ups' [had] had access to [the records] .... [nor any] ... doubt that a business supervisor could consent to the search of company property in the custody of a subordinate."[17]

Applying *Mancusi* to *Muniz*, the Court of Military Appeals noted that even though Muniz's commander was a law-enforcement authority, he also was Muniz's supervisor. The court reasoned that, as a supervisor, the commander should be in "no worse situation than his civilian counterpart, with respect to access to 'company' property".[18] The court then stated,

> [W]e note that the credenza, like any other item of government property within the command, was subject at a moment's notice to a thorough inspection. That omnipresent fact of military life, coupled with the indisputable government ownership and the ordinary nonpersonal nature of military offices, could have left appellant with only the most minimal expectation of privacy and security vis-a-vis his commander. This minimal expectation must be distinguished from an unquestionably greater expectation of privacy and security vis-a-vis the rest of the world.[19]

The court concluded that Muniz did not have a legitimate expectation of privacy in the credenza or its contents.[20]

Muniz offered the Court of Military Appeals an opportunity to establish a bright-line rule that a service member never may have a reasonable expectation of privacy in a government-owned desk. The court declined. Indeed, Chief Judge Everett, in his concurring opinion, left the door wide open for a service member to claim a right to privacy when he stated,

> Under some circumstances, a government employee or servicemember[sic] may have a reasonable expectation of privacy as to the contents of a desk or locker supplied by the government. In such a case, he would have standing to object to the fruits of the search of such property.[21]

After the Court of Military Appeals decided *Muniz*, the United States Supreme Court decided *O'Connor v. Ortega*.[22] Ortega was a physician whose office at the state hospital for which he worked was searched by hospital officials. Doctor Ortega then was on administrative leave pending the hospital's resolution of allegations that he had engaged in official misconduct. The officials searched Ortega's office without first obtaining a warrant. They later attempted to characterize the search as an inventory of state property. Doctor Ortega, however, sued the hospital under 18 U.S.C. § 1983,[23] alleging that the hospital had violated his Fourth Amendment right to privacy.[24]

Reviewing the case, the Court restated the general proposition that Fourth Amendment rights are implicated only when government agents have infringed upon "an expectation of privacy that society is prepared to consider reasonable".[25] Citing *Mancusi*,[26] the Supreme Court stated: "Within the workplace context, this Court has recognized that employees may have a reasonable expectation of privacy against intrusions by police."[27]

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[12] *Id.* at 204.

[13] *Id.* at 205.

[14] *Id.*

[15] *Id.*

[16] 392 U.S. 364 (1968).

[17] *Muniz*, 23 M.J. at 205.

[18] *Id.*

[19] *Id.* at 206 (citation omitted).

[20] *Id.*

[21] *Id.* at 208 (Everett, C.J., concurring).

[22] 480 U.S. 709 (1987).

[23] 18 U.S.C. § 1983 (1988).

[24] *Id.* at 717.

[25] *Id.* at 715.

[26] 392 U.S. 364.

[27] *Ortega*, 480 U.S. at 716.

The Court observed that an individual does not forfeit his or her Fourth Amendment rights by accepting a government job. The realities of the public workplace, however, may render some expectations of privacy unreasonable—especially when a supervisor, rather than a law-enforcement official, seeks to intrude on that privacy.[28] Indeed, the Court highlighted the distinction between work-related intrusions and intrusions by law-enforcement officials. Nevertheless, it also warned that "[c]onstitutional protection against unreasonable searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer."[29]

In *Ortega*, the Supreme Court continued its practice of addressing the issue of public employees' reasonable expectations of privacy on a case-by-case basis.[30] In the instant case, the Court held that Doctor Ortega had had a reasonable expectation of privacy in his desk and file cabinets. The Court explained that

> [t]he undisputed evidence disclose[d] that Dr. Ortega did not share his desk or file cabinets with any other employees. Dr. Ortega had occupied the office for 17 years and he kept material in his office that included personal correspondence, medical files, correspondence from private patients unconnected to the hospital, personal finance records, teaching aids and notes, personal gifts and mementos.
>
> ....
>
> Finally, we note that there was no evidence that the Hospital had established any reasonable regulation or policy discouraging employees such as Dr. Ortega from storing personal papers and effects in their desks or file cabinets ... although the absence of such a policy does not create an expectation of privacy where it would not otherwise exist.[31]

Significantly, in *Ortega* the Court focused mainly upon the Fourth Amendment as it relates to "work-related" searches by an *employer*. In its survey of the applicable law, the Court duly noted that: "The only cases to imply that a warrant should be required involve searches that are not work related ... or searches for evidence of criminal misconduct ...."[32]

In his concurring opinion, Justice Scalia similarly remarked, "[O]ne's personal office is constitutionally protected against warrantless intrusions by the *police*, even though employer and co-workers are not excluded. I think that we decided as much many years ago."[33]

In *United States v. Breseman*[34] the Court of Military Appeals reviewed the search of a desk that government had issued to the accused for his use during duty hours. Significantly, Breseman's commander properly authorized this search. Judge Cox, writing the principal opinion of the Court, concluded that whatever expectation of privacy Breseman might have had in the desk, his commander's compliance with the Military Rules of Evidence adequately had protected Breseman's rights. Chief Judge Everett, again writing a concurring opinion, agreed:

> I conclude that the commanding officer had probable cause to authorize a search of the appellant's desk and his BOQ room and that he authorized a search in compliance with the Military Rules of Evidence and the Fourth Amendment. Thus, like [the author of] the principal opinion, I have not tried to determine whether, under *O'Connor v. Ortega*, appellant had retained any expectation of privacy in the contents of the desk.[35]

The most recent military case to evaluate a service member's right to privacy in government property is *United States v. Craig*.[36] In *Craig*, the appellant had moved at trial to exclude from evidence items seized pursuant to a warrantless search of his desk. The military judge, denying Craig's motion, made the following findings of fact:

> [A]ppellant's desk was government owned and not capable of being locked; ... other personnel [had] shared [the] appellant's office until two weeks before the search of the desk; ... the purpose of the office was to conduct official government business; ... eight other persons had keys to the office where the desk was located; ... appellant had been ordered by a lieutenant, his supervisor until August or September 1989, to keep his desk unlocked and to remove personal items from it; ... a captain [also] used the desk many times and [regularly] entered the desk for paper ... [and] files ...; ... the captain [had] ordered the appellant to keep the desk unlocked so that others could have access to it; and ... the office was subject to security inspections at any time.[37]

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[28] *Id.* at 717.

[29] *Id.*

[30] *Id.* at 718.

[31] *Id.* at 718, 719 (footnotes omitted).

[32] *Id.* at 721 (footnotes omitted).

[33] *Ortega*, 480 U.S. at 730 (citing *Mancusi*, 392 U.S. 364) (Scalia, J., concurring) (emphasis added).

[34] 26 M.J. 398 (C.M.A. 1988).

[35] *Id.* at 400 (citation omitted) (Everett, C.J., concurring).

[36] 32 M.J. 614 (A.C.M.R. 1991).

[37] *Id.* at 615.

Reviewing these findings, the Army Court of Military Review logically decided that the appellant had had no reasonable expectation of privacy in his desk. The court, however, did not reach this decision without considering *Ortega*'s[38] impact on the military. Citing *United States v. Battles*,[39] the court noted that "the scope of the expectation of privacy depends in part on the demands of the workplace and its openness to employees and the public."[40]

Where Are We Today?

How likely is a service member to maintain a reasonable expectation of privacy in a government-owned desk assigned for his or her personal use? *Muniz*, *Breseman*, and *Craig* clearly show that a soldier may have an expectation of privacy in a government-owned desk, and that the military appellate courts are willing recognize this expectation as reasonable—at least as applied to searches by law-enforcement agents. In both *Muniz* and *Breseman* the Court of Military Appeals expressly rejected the Government's arguments urging the court to adopt a bright-line rule that would deny service members any reasonable expectations of privacy in government-owned desks. Indeed, in *Muniz* the court not only declined to adopt this rule, but also reached an opposite conclusion entirely.[41]

In *Craig*, the Army Court of Military Review evaluated the accused's right to privacy in his government-owned desk in the only constitutionally acceptable manner possible, by carefully arriving at a case-specific legal conclusion based upon the facts presented in the record of trial.[42] These facts revealed that Craig obviously had no reasonable expectation of privacy whatsoever in the desk. Indeed, circumstances more favorable to the government than those appearing in *Craig* could hardly be imagined. Only if a supervisor had told Craig expressly, "You *cannot* have a reasonable expectation of privacy in your desk!" could the Government have presented a better case. Undoubtedly, future litigation on this issue will involve facts more favorable to the defense than those in *Craig*.

The military courts have yet to evaluate fully one other important distinction. In *Ortega* the Supreme Court pointedly distinguished intrusions by an employer—against which an employee could exercise no reasonable expectation of privacy in 'company' property—from intrusions by the police—against which an employee would enjoy the protection of the Fourth Amendment.[43] Judge Cox reflected on this distinction in *Muniz* when he discussed a military commander's dual roles as a supervisor and as a law-enforcement authority. He opined that a commander should be in "no worse position than his [or her] civilian counterpart with respect to access to company property".[44] This assertion readily may be defended when a commander merely wants access to 'company' property, such as duty rosters or office supplies, or when, as in *Muniz*, a commander is motivated solely by a desire to help the dependents of a member of his or her command.

Occasionally, however, military commanders also must act as law-enforcement officials. Clearly, when a commander no longer is seeking to retrieve 'company' property and instead is engaged in a search for criminal evidence, he or she is acting not as a supervisor, but as a law-enforcement agent. When a commander conducts a search, the service member, not the commander, should be in "no worse position than his civilian counterpart".[45]

If contacted by a commander that wishes to examine an area within his or her command, a trial counsel should apply the following two-step analysis to determine whether the commander will need a warrant or authorization. The trial counsel first must determine whether or not the Fourth Amendment applies to the area to be examined. If no soldier may claim an expectation of privacy that is both subjectively and objectively reasonable, then the Fourth Amendment does not apply and the commander lawfully may search the area without a warrant. If the examination would abridge a soldier's reasonable, subjective privacy interest, however, then the Fourth Amendment does apply.

If the trial counsel determines that the Fourth Amendment applies, he or she must proceed to the second step of the analysis. The trial counsel now must determine the commander's purpose for conducting the examination. If the commander primarily intends to ensure his or her unit's security, fitness, health, and welfare, then the examination would be a lawful inspection under Military Rule of Evidence 313[46] and no warrant will be required. If the commander's purpose is to search for evidence of a

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[38] 480 U.S. 709.

[39] 25 M.J. 58 (C.M.A. 1987).

[40] *Craig*, 32 M.J. at 615.

[41] *Muniz*, 23 M.J. at 205; *see also supra* note 14 and accompanying text.

[42] *Craig*, 32 M.J. at 614.

[43] *Ortega*, 480 U.S. at 716.

[44] *Muniz*, 23 M.J. at 205.

[45] *See* Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 188 (1962) ("our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes").

[46] Mil. R. Evid. 313.

crime, however, then the Government must meet Fourth Amendment warrant requirements if it later wishes to enter the fruits of that search in evidence against the suspect.

The Hypothetical

How should the trial counsel in the hypothetical described above have advised First Sergeant Smith? His or her response should have been based upon the two-step analysis.

The first question is whether or not the Fourth Amendment applies to Sergeant Clean's desk. Does Clean have a subjective expectation of privacy in his desk? Obviously the trial counsel cannot know for certain, but the facts related by the first sergeant—that Sergeant Clean is the sole occupant of office, that he routinely locks his desk, and that he always locks his office door—strongly imply Clean does have a subjective expectation of privacy. Next, the trial counsel must determine whether Sergeant Clean's subjective expectation of privacy is objectively reasonable. Again, the answer to this question may not be determined easily. The trial counsel, however, must remember that a soldier *can* maintain a subjective, objectively reasonable expectation of privacy in government-owned property. The facts of the hypothetical suggest that Clean's subjective expectation of privacy in his government-owned desk very well may be objectively reasonable, at least vis-a-vis law-enforcement intrusions.

Once the trial counsel has found that Sergeant Clean has a subjective expectation of privacy in his desk and that this expectation is objectively reasonable, he or she then must consider why First Sergeant Smith wants to examine the desk and its contents. Clearly, the first sergeant's sole purpose is to search Clean's desk for evidence of a crime—the unlawful possession and distribution of cocaine. Because the Fourth Amendment applies to the area to be searched and the purpose of the search is to locate evidence of criminal activity, a warrant or authorization is required.

Accordingly, the trial counsel should advise First Sergeant Smith to obtain an authorization or warrant before he conducts the search. Nothing in the law, however, prevents the first sergeant from freezing the status quo by restricting access to the desk until he can obtain a search authorization.

Trial counsel should bear in mind that ignoring the clear meaning and express language of opinions from the Court of Military Appeals and the Army Court of Military Review does not fall under the category of aggressive prosecution. To advise a commander, "If it's government property, search it now, an authorization is not required!" is, at best, legally incorrect and, at worst, legally reckless.

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

The Emergence of the Due Process Entrapment Defense in the Military

Unlike most federal circuit courts, the Army Court of Military Review and the Court of Military Appeals have been reluctant to take a definitive position on due process entrapment.[1] Two recent decisions by the Court of Military Appeals, however, may lend greater viability to this defense at courts-martial.[2] The essence of the due process entrapment defense is that government agents have engaged in conduct so outrageous that to permit the Government to use the judicial process to obtain a conviction against the accused would flout the due process principles of the Fifth Amendment.[3] In contrast to the subjective test for entrapment—in which the defense focuses on the predisposition of the accused—the defense of due process entrapment incorporates an objective test that concentrates on the conduct of the government agents. As Justice Roberts explained in his dissenting opinion in *Sorrells v. United States*, the due process defense derives from the public policy of deterring police misconduct.

[1] *See* United States v. Dayton, 29 M.J. 6 (C.M.A. 1989) (implying that an accused may claim due process entrapment as a defense when the government's conduct in inducing or encouraging the criminal activity was outrageous); United States v. Frazier, 30 M.J. 1231 (A.C.M.R. 1990) (entertaining the possibility of due process entrapment in reverse sting cases); United States v. Blais, 20 M.J. 781 (A.C.M.R. 1985) (holding that the due process defense does not arise when an accused is predisposed to deal drugs even when the government agent supplies the drugs).

[2] United States v. Cooper, 33 M.J. 356 (C.M.A. 1991); United States v. Bell, CM 66143 (C.M.A. 30 Sept. 1991).

[3] United States v. Russell, 411 U.S. 423 (1973).

> [W]here a law enforcement officer envisions a crime, plans it and activates its commission by one not theretofore intending its perpetration, for the sole purpose of obtaining a victim through indictment, conviction and sentence, the consummation of so revolting a plan ought not to be permitted by any self-respecting tribunal .... Public policy forbids such sacrifice of decency. This view ... frankly recognizes the foundation of the doctrine on the public policy which protects the purity of government and its process .... The protection of its own functions and the purity of its own temple belongs only to the court. It is the province of the court and the court alone to protect itself and the government from the prostitution of the criminal law .... The ... courts must be closed to the trial of a crime instigated by the government's own agents.[4]

Accordingly, when the Government has engineered and directed a criminal enterprise from start to finish, it should be held to have violated due process.[5]

Before its decisions in *United States v. Cooper* and *United States v. Bell*, the Court of Military Appeals had addressed the issue of due process entrapment only rarely.[6] In *United States v. Vanzandt*, the seminal entrapment decision, the Court of Military Appeals acknowledged in a footnote the potential for using a due process entrapment defense in courts-martial.[7] The court found that courts which recognized an objective, rather than a subjective, test for entrapment clearly were in the minority and, therefore, declined to institute the objective test of entrapment in the military. The court noted, however, that when an accused raises a due process defense, the military judge must resolve this issue as a matter of law.[8]

In *Cooper*, the accused argued that he had been denied due process because government agents actively had solicited his involvement in drug offenses while he was enrolled in the Army Drug and Alcohol Prevention and Control Program (ADAPCP). Despite Army regulations that specifically prohibit police intrusions into the rehabilitative process, the registered source had sought out the accused and had convinced him to obtain and distribute cocaine.[9] The registered source was aware when he recruited the accused that the accused was addicted to crack cocaine and that he then was participating in a rehabilitation program. The accused argued that the registered source's knowledge was imputed to the Criminal Investigation Command (CID) and that the CID, consequently, had violated its own regulations, as well as the Army's, by targeting him. He advanced a due process defense based on the proposition that the government had violated fundamental fairness and equity by undermining the purposes of the drug rehabilitation program in which he had enrolled.

The lead opinion, written by Judge Cox, held that the accused had not been denied due process. Judge Cox's derived this opinion from his finding that the government could disavow its informant's knowledge.[10] Significantly, however, Judge Cox also stated that "[i]f we were convinced that the CID *knowingly* sought out a [service] member who was in the program for the purpose of setting him [or her] up for a subsequent arrest, then clearly we would have to find that a violation of due process occurred."[11]

In *Bell*, as in *Cooper*, the registered source had induced the accused to distribute drugs, even though the source then knew that the accused was acutely addicted to cocaine and that he had enrolled himself voluntarily in the Army's drug rehabilitation program. The source, however, had not related this information to the supervising CID agent until after the accused's first distribution of cocaine. On appeal the accused had not addressed the issue of denial of due process. Instead he had alleged that the military judge had erred by denying a defense motion to dismiss the charges because the CID violated its own regulations in targeting the accused. On review, the Court of Military Appeals, citing *Cooper*, instructed the Army Court of Military Review to reconsider its affirmation of the accused's findings and sentence.

Unfortunately for the accused, the Army court may find in Chief Judge Sullivan's concurring opinion in *Cooper* sufficient justification to reaffirm Bell's findings and sentence. In *Cooper*, the chief judge declared that

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[4] 287 U.S. 435, 454-59 (1932).

[5] Hampton v. United States, 425 U.S. 484 (1976) (Powell J., concurring).

[6] United States v. Clark, 28 M.J. 401, 406 n.4 (C.M.A. 1989); *see also* United States v. Dayton, 29 M.J. 6 (C.M.A. 1989).

[7] 14 M.J. 332, 343 n.11 (C.M.A. 1982).

[8] *Id.*

[9] *See, e.g.*, 42 C.F.R. §§ 2.17, 2.35, 2.65, 2.67 (1990); Army Reg. 600-85, Alcohol and Drug Abuse Prevention Program, para. 2-16*a* (21 Oct. 88) (stating that because Army policy encourages voluntary entry into ADAPCP neither the police nor their agents may solicit information from clients); Army Reg. 195-2, Criminal Investigation: Criminal Investigation Activities, para. 3-7 (30 Oct. 85) (forbidding investigations into pre-entry offenses of ADAPCP patients or approaching known patients for information about drug distribution); *see also* U.S. Criminal Investigation Command Reg. 195-15, Criminal Investigation: USACIDC Source Program, para. 2-5*b*(5) (1 Nov. 87) ("investigative personnel, to include sources, will not solicit information from participants in ADAPCP").

[10] Judge Cox's finding appears unsound in light of the Supreme Court's holding in *Sherman v. United States*, 356 U.S. 369, 375 (1958), that the government cannot make "use of an informer and then claim disassociation through ignorance."

[11] *Cooper*, 33 M.J. at 358 (emphasis added).

neither Army, nor CID, regulations proscribe "sting operations" against individuals in rehabilitation programs. The only conduct that these regulations actually prohibit is the "placement of informants in ... [an ADAPCP] program[], and use of information gathered by informants or undercover agents against the patients of such a program."[12] This is a curious finding, because the gathering of information by informants that the chief judge described is substantially less intrusive than a "sting operation". Nevertheless, in a glimmer of hope for future cases of this nature, Chief Judge Sullivan also noted that he would rule differently in a case in which a registered source approached an accused that had entered a rehabilitation program to overcome cocaine addiction and induced him or her to use cocaine, rather than to distribute it.[13]

When an accused raises due process entrapment as a defense, the facts that surround the alleged government misconduct will decide the success of the defense. Military courts essentially have ruled only that the government violates due process when its inducement or encouragement of the criminal activity is so outrageous that it shocks the universal sense of justice.[14] To meet so ambiguous a standard, the defense must take care to develop the facts of the misconduct completely. This painstaking development of the facts is crucial because the accused bears the burden of proving the government's overreaching.[15]

United States v. Frazier[16] provides a good example of the sort of facts that a military appellate court will scrutinize in a due process entrapment case. In *Frazier* the Army Court of Military Review stated, "Whether particular conduct by the police and their agents is 'outrageous' or 'shocking' or 'offensive to fundamental fairness' depends on the panoply of facts presented by each case."[17] The Army court carefully examined the accused's level of participation in the transaction, stressing the distinction between active and passive participation. It noted the amount of inducement that the government had offered to the accused and the accused's inquiries into where he could get drugs and considered whether the accused, or the government, had initiated the transaction and whether the government had had a legitimate suspicion that the accused was involved in illegal drugs.[18]

Other decisions, outside the military, also illustrate that governmental inducements are insufficient bases for an entrapment defense if government agents have done no more than provide the accused with an opportunity to commit a crime. The defense must show that the government's involvement was both substantial and overreaching.[19] The defense is more likely to succeed if it presents evidence that the accused and the government agent had prior ties or a relationship. In *Greene v. United States*, for example, the court held that the government clearly had gone beyond affording opportunities for the commission of offenses. The court found several factors particularly persuasive when it decided that the government's conduct barred prosecutions of the defendants: (1) the government agent had reestablished contact with the defendants even though his prior undercover work with them had been successful and he had had no further reason to deal with them; (2) the course of events that eventually led to the second arrest of the defendants lasted for several years; (3) the government agent had offered to provide the defendants with equipment and manpower and had given the defendants 2000 pounds of sugar they needed to make illegal bootleg alcohol; (4) the government agent had pressured the defendants into producing alcohol; (5) the government agent had not infiltrated the criminal enterprise to terminate it—indeed, he already had completed that mission—rather, he had helped to reestablish and then sustain a criminal operation that already had been stopped; (6) throughout the entire operation the government agent was the only customer of the defendants.[20] The court explained that, although the government had offered reasonable explanations for its conduct and no one of the factors listed above, standing alone, necessarily would require reversal of a conviction, the "combination" of these actions forced the court to reverse the convictions.[21] "Under these circumstances, the Government's conduct rises to a level of 'creative activity,' [that is] substantially more intense and aggressive than the level of such activity ... in ... entrapment cases ...."[22]

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[12] *Id.* at 360.

[13] *Id.* Cooper's appellate counsel requested reconsideration and the Court granted the request on 5 November 1991.

[14] United States v. Dayton, 29 M.J. 6, 11 (C.M.A. 1989); United States v. Frazier, 30 M.J. 1231, 1235 (A.C.M.R. 1990); *see also* United States v. Russell, 411 U.S. 423 (1973).

[15] *See* People v. D'Angelo, 257 N.W.2d 655, 661 (Mich. 1977) (placing the burden on the accused to direct the issue away from guilt or innocence and toward "a collateral charge that the government is guilty of corrupt use of its law enforcement authority").

[16] 30 M.J. at 1231.

[17] *Id.* at 1235.

[18] *Id.* at 1235-36. *But see* United States v. Allibhai, 939 F.2d 244 (5th Cir. 1991) (asserting that all federal courts of appeals have rejected the contention that "the right to be left alone" requires a court to impose a reasonable suspicion requirement on the government to protect citizens from unwarranted and capricious governmental intrusions).

[19] *E.g.*, Greene v. United States, 454 F.2d 783 (9th Cir. 1971).

[20] *Id.* at 786-87.

[21] *Id.* at 787.

[22] *Id.* (citing Sherman v. United States, 356 U.S. 369 (1958)).

The due process entrapment defense is a matter that must be resolved by the military judge.[23] Accordingly, an accused may raise this issue in a contested trial or at a guilty plea. The trial counsel should be prevented from introducing evidence of the accused's predisposition because that evidence is irrelevant under the objective entrapment test. The defense counsel must remind the court continually that the proper focus of the inquiry is "whether persons at large, who would not otherwise have done so, would have been encouraged by the government's action to engage in crime."[24] Counsel also should note that the courts are unlikely to sanction intimate sexual relationships between the accused and the government agent.[25] Captain Mayer.

"Mistake of Wife" Defense Renders Guilty Plea Improvident

Preparing an accused for a providence inquiry can be one of a trial defense counsel's most difficult tasks. A defense counsel first must overcome the accused's instinctive refusal to admit guilt for an offense. Then the attorney must prepare the accused to withstand the rigors of a military judge's questions during a providence inquiry. The accused specifically must admit to any acts that he or she committed which are elements of the offenses with which he or she has been charged and then must agree that he or she actually is guilty of those offenses. Defense counsel also must discuss with the accused any possible defenses to the charges that arise from the evidence in the case. Defense counsel, however, commonly limit their discussions of possible defenses to the defenses that accused routinely raise at trial—for example, alibi, consent, mistake of fact, or financial ability.

Most defense attorneys would not consider an accused's mistaken belief about the identity of his sexual partner to be a defense to a carnal knowledge charge because carnal knowledge is a strict liability offense with respect to an accused's beliefs concerning the age of the accused's sexual partner. A recent opinion by the Court of Military Appeals, however, found that carnal knowledge is *not* a strict liability offense concerning a mistake of fact about the *identity* of an accused's sexual partner. In *United States v. Adams*[26] the court held that a mistake of fact about the identity of the accused's sexual partner was an issue that went to "whether the act was legally or morally wrong *at all* ...."[27] The court, therefore, refused to impose a strict liability standard.

In *Adams*, the accused had testified during his guilty plea providence inquiry that he had been awakened in his bed by a person, whom he had believed to be his wife, who had fondled him to the point of sexual arousal. Thinking that his wife was initiating sex, the accused engaged in sexual intercourse, as he normally would under these circumstances. As the accused approached climax, however, he heard his partner say, "Dad." This was how his niece, who resided in the Adams' home, frequently referred to the accused. Realizing that his fifteen-year-old niece had slipped into his bed, the accused immediately stopped his actions.

In ruling that a mistake of identity could be a defense to carnal knowledge, the Court of Military Appeals rejected an argument—advanced by the Government, and upheld by the Army Court of Military Review[28]—that because an accused's mistaken belief of the age of the victim is not a defense to carnal knowledge, by analogy, Adams' mistaken belief about the identity of his sexual partner should not be a defense to that offense. The court pointedly noted that the accused "was not simply protesting the *degree* of his moral and legal wrong; rather, he was asserting that he did not believe he was doing *anything at all* wrong."[29] Finding that the military judge neither had explained the defense of mistake of fact to the accused, nor had ascertained whether the accused was asserting this defense, the court concluded that the judge thus had "failed to establish the providence of the [accused's] pleas on the record."[30]

Adams is fact-specific to the defense of mistake of fact in a carnal knowledge offense. Even so, defense counsel should not forget in *Adams* the Court of Military Appeals stated clearly that if an accused's belief that he or she may have a possible defense to a charged offense "is not so outlandish as to be absurd .... [u]nder such circumstances, neither the military judge nor an appellate court should reject his [or her] claim as unreasonable as a mat-

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[23] *See* United States v. Dayton, 29 M.J. 6, 11 (C.M.A. 1989); United States v. Vanzandt, 14 M.J. 332, 343 n.11 (C.M.A. 1982).

[24] Nat'l Comm'n on the Reform of Fed. Criminal Laws, Working Papers of the National Commission on the Reform of Federal Criminal Laws 306 (1970). *See generally* P. Marcus, The Entrapment Defense, 83-210 (1989).

[25] *See* United States v. St. Mary, 33 M.J. 836, 839 n.2 (A.C.M.R. 1991) (in which the Army court noted that it would not condone a female government agent inducing the distribution of drugs by offering sexual favors).

[26] 33 M.J. 300 (C.M.A. 1991).

[27] *Id.* at 302.

[28] United States v. Adams, 30 M.J. 1035 (A.C.M.R. 1990).

[29] *Adams*, 33 M.J. at 302.

[30] *Id.* at 303.

ter of law. Instead, that evaluation is one for the trier of fact."[31] With that guidance in mind, the defense counsel must discuss *all* possible defenses with the accused and must ensure that the accused actually believes that the defenses are not available under the facts of the case before the counsel allows the accused to testify during a providence inquiry. Further, if the possibility of a defense arises during the providence inquiry, the defense counsel must ensure that the military judge advises the accused of the defense and ascertains whether the accused is claiming the defense. Captain Moran.

Clerk of Court Note

Why "Few Reversible Errors [Are] Found"

An Army Court of Military Review affirmance rate of "92.6" (actually 90.6) percent of cases decided in 1990 is "discouraging," according to a note recently published in *The Army Lawyer*. *See* DAD Note, *Few Reversible Errors Found*, The Army Lawyer, Oct. 1991 at 34. This fact perhaps may be discouraging to a hopeful appellant, but it is hardly surprising. Under our mandatory appellate review system, military appellate courts, unlike most civilian courts, regularly must review cases in which the convictions stem from pleas of guilty. Indeed, appeals from these convictions constitute approximately two-thirds of the Army Court of Military Review's caseload.

Appellants file an even higher percentage of appeals with the court—seventy-four percent in 1990—without claiming any error at all, other than an occasional complaint that a sentence is inappropriately severe. The Army court, however, granted relief in 9.4 percent of its 1846 decisions (173 cases). This suggests that the court must have reached these 173 decisions in the twenty-six percent of the appeals it considered (480 cases in all) in which the appellants actually had assigned errors—a remarkable thirty-six percent rate of complete or partial success for appellate counsel.

That inference, however, is not entirely correct. The court also found error in cases in which the appellants had alleged no errors. In the first ten months of 1991, the court wrote opinions in sixty-five (or nine percent) of the cases submitted without assigned error. None warranted dismissal of the charges, though the court did remand one case for a rehearing. In eleven others cases, the Army court either set aside or modified findings of guilty. Altogether, the court reduced appellants' sentences in some twenty cases.

If the overall rate of complete affirmance by the Army Court of Military Review seems high, this may be attributed in large degree to the number of uncontested trials and the concomitantly high percentage of cases in which appellate defense counsel found no error. Even in those cases, however, the court sought, and often found, grounds to afford the appellants at least some relief. Mr. Fulton.

Regulatory Law Office Note

Demand Side Management and Energy Conservation

Opportunities for facilities engineers, procurement officers, and their lawyers to promote energy conservation and to save scarce funds may exist at every major installation. Judge advocates should be aware of three recent changes that affect the procurement of electric utility services which promote energy conservation in an area called "demand side management."

First, Congress recently amended Title 10 of the United States Code, adding 10 U.S.C. § 2865(b)(3)(A). This statute encourages each military department "[t]o participate in programs conducted by any gas or electric utility for the management of electricity demand or for energy conservation ...." *See* Act of Nov. 5, 1990, Public Law 101-51, § 2851(a). It provides that, for budgetary purposes, a military department may retain two-thirds of energy cost savings that it achieves through conservation to fund prescribed military department activities in the following fiscal year. Second, on March 19, 1991, the Department of Defense issued Defense Energy Procurement Policy Memorandum (DEPPM) 91-2 to provide military installations with guidance on demand side management programs of electric utilities. Finally, on April 17, 1991, President Bush signed Executive Order 12,759. Sections 4 and 6 of this order direct all federal agencies to encourage federal activities to participate in demand side management programs. Lawyers involved in the procurement of public utility services should familiarize themselves with this guidance.

Demand side management is an effort, financed by utilities, to control the amount of generating plants they need to meet the future needs of a utility system during periods of peak usage by increasing the efficiency of their customers' uses of electric power. It not only conserves energy, but also avoids rate increases that utilities otherwise would have to levy to finance investments in additional power plants.

Utilities commonly meter electric power usage at Army facilities in two ways. They measure demand in terms of kilowatts (kw) and energy in terms of kilowatt hours (kwh). The latter term essentially describes the duration of a given demand. By law, electric utilities must maintain sufficient generating capacity to serve all firm demands at all times. The capacity of an electric utility is limited by the number of kilowatts that available generating units can produce. If customers reduce their demand during peak demand periods the utility need not

[31] *Id.*

build additional generating plants to comply with the law. Accordingly, reducing demand also reduces required investment in generating capacity.

Customers can reduce their demand in a demand side management program in four ways. They can (1) use cycled air conditioning; (2) use remote controlled hot water heating; (3) use high efficiency lighting; and (4) use interruptive tariff rates in combination with customer supplied back-up generation.

Executive Order 12,759 and DEPPM 91-2 provide defense agencies with policy direction and guidance for demand side management. Implementation of demand side management will be an installation function. The procurement of electric utility services thus may pose challenges for facilities engineers and their lawyers. The Regulatory Law Office also has appeared recently in several proceedings before state regulatory commissions concerned with demand side management. More of these proceedings may occur when utilities request rate increases.

The Regulatory Law Office presently is working with the engineers at the U.S. Army Engineering and Housing Support Center (CEHSC-OC), with the General Services Administration, and with counsel for other military departments and major Army commands to address demand side management issues. Concerned personnel at installations should report rate filings by utilities to the Regulatory Law Office in accordance with Army Regulation 27-40, Legal Services: Litigation, para. 1-4*g* (4 Dec. 1985) *amended by* 32 C.F.R. § 516.4(g) (1990). Mr. Nyce.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Ethically Speaking, When Is the Conclusion of a Court-Martial?

Assume that you are a defense counsel. While you were representing a client at trial, your client testified that he had no involvement in the charged offenses. Your masterful trial advocacy persuaded the court members to acquit your client of all the serious charges, but they convicted him of a minor dereliction, for which he received a minor punishment. You presently are awaiting the military judge's authentication of the record of trial. Your client visits you in your office, bursting with excitement about how he was able "to pull the wool over everyone's eyes." When you ask him what he means, he admits that his testimony at trial was false. This revelation confirms what before you had only suspected.

What is your ethical obligation? Army ethical rules state that an attorney may not knowingly make false statements of law or fact to a tribunal, or offer evidence that the lawyer knows to be false.[1] If the attorney has offered false, material evidence and later learns of its falsity, the rules require the attorney to take "reasonable remedial measures."[2] Army Rule 3.3(b) indicates that the attorney's obligations regarding false statements and evidence "continue to the conclusion of the proceeding." Moreover, this obligation exists "even if compliance would require disclosure of information otherwise protected by the [rule of confidentiality]."[3]

The Army adopted Rule 3.3 and its comment from the ABA Model Rules of Professional Conduct without change. The rule leaves unanswered a critical question: When does a court-martial conclude? The comments to the ABA and Army Rules indicate merely that a practical time limit on the obligation to rectify false evidence must be established and that the "conclusion of the proceeding" is a reasonably definite point to terminate the attorney's obligation.[4]

Does a court-martial conclude when the sentence is adjudged, when the military judge authenticates the record, when the convening authority takes action, when appellate review is completed, or at some other time? In the civilian setting, a trial is typically considered complete when the court adjudges a sentence, but no clear answer exists in the Army.[5]

Instructors at The Judge Advocate General's School have answered this question by telling counsel to rely on Army Rule 5.2, which essentially states that an attorney is protected from ethical liability if he or she relies on a

[1] Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers, Rule 3.3(a) (31 Dec. 1987) [hereinafter Army Rule].

[2] Army Rule 3.3(a)(4).

[3] Army Rule 3.3(b).

[4] Army Rule 3.3, comment.

[5] In the Navy, the applicable ethical rule states that the obligation continues until the "conclusion of the representation." JAGINST 5803.1, Encl. (1), Navy Rule 3.3b (26 Oct. 1987). This standard closely resembles the obligation of the trial defense counsel to represent the accused until substitute counsel or appellate defense counsel have been detailed and have commenced their duties. *United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977).

supervisor's ethical judgment concerning unclear ethical issues. This answer, however, merely pushes the problem up one step in the chain of command. Lacking specific guidance on this issue, supervisors also have had to struggle to find a satisfactory answer.

The United States Court of Military Appeals recently provided some guidance, albeit not in a professional responsibility context, on when a court-martial becomes final. In *United States v. Allen*,[6] the court stated, "we agree ... that in military practice the results of a trial do not become final until the convening authority has acted." *Allen* appears to offer supervisory attorneys a concrete point of conclusion for a court-martial, but the decision may not resolve the ethical dilemma completely. The *Allen* court also acknowledged that for some purposes, a conviction is established for a military accused after the court adjudges a sentence.[7] Nevertheless, supervisors now may add *Allen* to their arsenal of supporting authorities when they make an informed decision regarding the concluding point of a court-martial.

If an attorney does decide that disclosure is necessary, what remedial measures should he or she take? The comments to the Army Rules indicate that the lawyer first should try to have the client correct the matter on the record—for instance, at a post-trial article 39(a) session. If the client refuses, the attorney should disclose the deception to the tribunal personally.[8] The tribunal then must decide what should be done.

When confronted with a client that has deceived the court, an attorney always must remember that the Army Rules take the position that an accused has no right to the assistance of counsel in committing perjury.[9] In these situations, the lawyer's ethical duty of candor to the tribunal takes priority over the attorney-client relationship.[10] Lieutenant Colonel Holland.

Defense Counsel Ethics: Revealing the Client as the Source of Evidence

In *Commonwealth v. Ferri*[11] on the day after he murdered someone, a client gave the clothing he was wearing when he committed the murder to his defense counsel. When the defense counsel terminated the representation before trial, the defense counsel gave the clothing to an attorney in the public defender's office. This attorney then submitted the clothing for testing at the county crime laboratory. The prosecutor eventually learned of the existence of the clothing and obtained it from the laboratory. At trial, the judge permitted the client's former defense attorneys—both the attorney to whom the client originally gave the clothing and the second attorney, who by then neither represented the client, nor worked for the public defender—to reveal where they had obtained the clothing. Without this testimony to establish a chain of custody of the clothing, the prosecution could not have admitted the clothing and laboratory results into evidence.

The *Ferri* court remarked on the general proposition that while the prosecution is permitted to use physical evidence obtained from defense counsel, who receives the evidence from the accused, the prosecution may not disclose the source of the evidence.[12] This rule balances the prosecution's right to use the evidence against the accused's right to protect the privileged circumstances that surround the defense counsel's possession of the evidence. The court in *Ferri*, however, then stated:

> Permitting the use of the privilege to effectively block the admissibility of non-privileged physical evidence, merely because it is placed in a lawyer's hands, is unreasonable .... The source of the evidence should be protected but not at the cost of denying admission of otherwise admissible evidence. An appropriate balance [in this case] is to limit the testimony [of the defense counsel] to establishing a chain of custody .... The privileged communications [remain] protected to the extent possible, while the [government is] permitted to use the non-privileged physical evidence.

A recent opinion of the United States Court of Military Appeals, *United States v. Rhea*,[13] serves as a basis for comparison on how the *Ferri* case would have been decided by a military court. A discussion of the Air Force Court of Military Review's decision in *Rhea* appeared in a note previously published in *The Army Lawyer*.[14] The note analyzed the defense counsel's duty to surrender evi-

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[6]33 M.J. 209, 215 (C.M.A. 1991).

[7]*Id.*; *see, e.g.*, Mil. R. Evid. 609(f) (for purposes of impeachment, a conviction exists when the court adjudges a sentence).

[8]Army Rule 3.3, comment.

[9]*Id.*

[10]*Id.*

[11]No. 00133, 1991 WL 199,615 (Pa. Super. Ct. Oct. 9, 1991).

[12]*See* Commonwealth v. Stenhach, 514 A.2d 114 (Pa. Super. Ct. 1986); State *ex rel.* Sowers v. Olwell, 394 P.2d 681 (Wash. 1984). *Contra* People v. Nash 341 N.W.2d 439 (Mich. 1983).

[13]33 M.J. 413 (C.M.A. 1991).

[14]TJAGSA Practice Note, *The Defense Counsel's Duty to Deliver Evidence Implicating a Client*, The Army Lawyer, Apr. 1990, at 63.

dence in his or her possession when that evidence implicates the client in the offense for which the defense counsel is representing the client. The Air Force court had held that the defense counsel properly turned over to the prosecution a calendar, which had corroborated the victim's testimony and which the accused previously had delivered to the defense counsel.[15] The Court of Military Appeals affirmed the Air Force court's decision in *Rhea*.[16]

The Court of Military Appeals upheld the reasoning of the trial judge and lower appellate court concerning ethical rules and the attorney-client privilege was sound. It did not confine itself, however, simply to approving the lower courts' decisions. The court went further in its opinion by discussing applicable discovery rules. It noted that the calendar had been the subject of a search authorization of the accused's quarters after the accused had removed the calendar and had given it to his defense counsel. The calendar undoubtedly was relevant evidence because the victim of the accused's sexual abuse had annotated the dates of the sexual intercourse on the calendar. The Court of Military Appeals indicated that any withholding of the calendar by the defense would be contrary to: (1) R.C.M. 701(e), which states, "No party may unreasonably impede the access of another party to a witness or evidence"; and (2) the principle underlying R.C.M. 703(a), which states, "The prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence ...."[17] The court then stated broadly that "[s]ince, certainly under the facts of this case, disclosure was required by law, defense counsel acted in full comportment with their ethical obligation to disclose the calendar ...."[18]

The court, however, added that the defense counsel were not at liberty to inform the prosecutor how the calendar came into their possession. This disclosure, the court ruled, would violate the attorney-client privilege. While the calendar itself was not a protected communication between attorney and client, the client's act of delivering the calendar to the attorney constituted a communication protected by the attorney-client privilege.[19] Moreover, the court indicated that even if the defense counsel inadvertently had disclosed the source of the evidence to the prosecution, the trial counsel could not reveal this information to the factfinder.[20] This statement contrasts sharply with the language in *Ferri*.

If faced with the *Ferri* facts, would the Court of Military Appeals decide the case differently or would it adhere to its ruling in *Rhea* that defense counsel may not reveal how they came to possess evidence that incriminates their clients? Rule for Courts-Martial 701(f) apparently would leave the court with no choice but to adhere to *Rhea*. The procedural rule states, "Nothing in this rule shall be construed to require the disclosure of information protected by the Military Rules of Evidence." If, as the court held in *Rhea*, the act of delivery of physical evidence constitutes a "communication" concerning the source of the evidence within the meaning of the military attorney-client privilege expressed in Military Rule of Evidence 502, then the court would have to hold that the disclosure of the source is inadmissible.

At present, this discussion is only of academic interest. Even so, the difference in holdings and in judicial reasoning in *Ferri* and *Rhea* highlights the unique nature of military discovery practice and the applicability of the Rules for Courts-Martial. Counsel and judges must not follow civilian case law blindly, but instead should remember the singularity of military practice. Lieutenant Colonel Holland.

Admissibility of Scientific Evidence

Consider the in-court battle between two experts over a new scientific hypothesis, a very complicated forensic matter, or a form of technology being developed solely by one of the experts. Confronted with their contradictory testimony, the military judge faces a tough choice in deciding whether to admit the evidence.

Until 1987, a military judge's decision on the admissibility of scientific evidence depended on whether the proponent expert's reasoning was accepted generally within the relevant scientific community.[21] Many jurists, however, felt that this standard unnecessarily precluded courtroom use of useful—albeit still developing—technology. A general desire to get more evidence before the factfinder spurred changes in the law, which ultimately resulted in the Federal and Military Rules of Evidence. The *Gipson*[22] decision soon followed, signalling a broader acceptance of scientific evidence in the military. Now, if scientific evidence is relevant, helpful, and probative, it should be admitted, considered, and given whatever weight is appropriate. Does this mean, however, that virtually all scientific evidence proffered must be admitted?

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[15] 29 M.J. 991 (A.F.C.M.R. 1990).

[16] 33 M.J. 413 (C.M.A. 1991).

[17] 33 M.J. at 418.

[18] *Id.*

[19] 33 M.J. at 417-418.

[20] 33 M.J. at 419.

[21] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

[22] United States v. Gipson, 24 M.J. 246 (C.M.A. 1987).

Some thoughtful trial judges are beginning to question the merits of the wholesale admission of scientific and expert testimony. Is the cause of military justice truly best served by simply admitting all the evidence and letting the factfinders sort it out? Will a court-martial panel always be able to sort out and evaluate difficult and conflicting scientific testimony? Military judges should realize they must "exercise reasonable control over the mode...of presenting evidence so as to make the interrogation and presentation effective for the ascertainment of truth [and] avoid needless consumption of time ...."[23] Under the right circumstances, a military judge properly could further this goal by excluding otherwise relevant scientific evidence.

As mentioned above, the military judge should determine whether the evidence is relevant, helpful, and probative. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[24] Under this broad definition, relevant evidence is also probative.[25] A military judge, however, should not equate a finding that certain scientific evidence is relevant and probative with a finding that the evidence is helpful to the factfinder and, therefore, must be admitted. For example, evidence that is relevant because it facially addresses an issue in the case may be so unreliable that it is patently unhelpful to the panel. Similarly, if the evidence rests on very difficult or greatly disputed concepts that are so far beyond the grasp of the factfinders that they cannot evaluate the evidence competently, then the evidence is not helpful and should be excluded.

Justice, however, generally is served best by getting more evidence, not less, before the factfinder—especially in the military justice system, where well-educated panels are commonplace. Before excluding difficult or hotly contested scientific evidence, a military judge should consider carefully the collective abilities of the court-martial panel.

Military judges also should consider their other powers before they exclude difficult scientific evidence. If a truly independent expert witness would be helpful to the court—for instance, when the testimonies of two highly partisan expert witnesses are diametrically opposed—the military judge should consider use of his or her inherent authority to call expert witnesses.[26] The judge also could exercise this power if he or she doubts that the panel has understood the testimonies of partisan experts. While the testimony of a court's witness is not entitled to any greater weight by virtue of that witness's being called by the court, an expert that is free from any inherent adversarial bias often is in a better position to assist panel members to understand evidence and to untangle difficult concepts. Moreover, the experienced, well-educated, neutral military judge often may make experts and evidence more helpful by asking neutral, well-placed questions of the experts.[27] Military judges should not become advocates, but neither should they shy away from asking questions in the attempt to ascertain the truth. Major Warner.

Has Anyone Really "Considered" What "Consider" Really Means?

Rule for Courts-Martial (R.C.M.) 1107[28] provides that the convening authority has "sole discretion" when deciding appropriate postconviction action. The rule states: "Determining what action to take on the findings and sentence of a court-martial is a matter of command prerogative."[29] Recent case law has emphasized that this discretion is absolute.[30]

Because the convening authority's discretion is absolute, the right of the accused to submit material for the convening authority's consideration is critical. Rule for Courts-Martial 1107 states that before taking action, the convening authority "shall consider" the result of trial, the posttrial recommendation of the staff judge advocate, and "*any matters submitted by the accused under R.C.M. 1105 or, if applicable, R.C.M. 1106(f).*"[31] In accordance with this requirement, the Court of Military Appeals has

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[23] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 611 [hereinafter Mil. R. Evid. 611].

[24] Mil. R. Evid. 401.

[25] "Probative" means "[h]aving the effect of proof; tending to prove; or actually proving." Black's Law Dictionary 1367 (rev. 4th ed. 1968).

[26] Mil. R. Evid. 611(a), 706.

[27] Mil. R. Evid. 611(b).

[28] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1107(b)(1) [hereinafter R.C.M.].

[29] *Id.*

[30] *See* United States v. McKnight, 30 M.J. 205 (C.M.A. 1990) (even though the staff judge advocate expressed an opinion that the evidence was insufficient as to a charge and its specification, the convening authority could disregard that opinion without providing a written rationale); United States v. Tu, 30 M.J. 587 (A.C.M.R. 1990) (convening authority is not required to review the record for legal correctness or factual sufficiency; moreover, action is within the sole discretion of the convening authority as a command prerogative.).

[31] R.C.M. 1107(b)(3)(A) (emphasis added). Rule for Courts-Martial 1105 submissions are clemency petitions. Rule for Courts-Martial 1106(f) submissions are responses to the staff judge advocate's posttrial recommendation.

insisted that the convening authority receive and consider all "written" defense submissions before taking action.[32] The court, however, has made no effort to address unwritten defense submissions. Must the convening authority consider an accused's unwritten requests for clemency or responses to submissions by the staff judge advocate?

United States v. Davis

In *United States v. Davis*[33] Senior Airman Trevet D. Davis pled guilty to twice committing sodomy by force with children under the age of sixteen[34] and to committing indecent acts on two other occasions with children under the age of sixteen.[35] Court members sentenced Airman Davis to a dishonorable discharge, confinement for twenty-two years, total forfeiture of all pay and allowances, and reduction to the rank of airman basic (E-1).[36]

After sentencing, the trial counsel provided Airman Davis with written notice of his right to submit clemency "material."[37] The notice advised Airman Davis: "All matters you submit will be considered by the convening authority before the action is taken in your case."[38] Airman Davis subsequently submitted numerous clemency requests, including a thirty-five to forty minute videotape of himself, and several letters and notes written by him, his family members, and his friends.[39]

The staff judge advocate prepared an addendum to the posttrial recommendation.[40] The addendum provided a four-sentence summary of the videotape and advised the convening authority: "You are not required to view the videotape."[41] The staff judge advocate based this conclusion on language in R.C.M. 1105(b) that provides: "The accused may submit to the convening authority any *written* matters ...."[42]

The convening authority did not review the videotape. The convening authority indicated this by writing "no" in the margin of the posttrial advice next to the sentence "[Y]ou may view it [the videotape] if you wish."[43]

On appeal, Airman Davis argued that the staff judge advocate had erred when he advised the convening authority that the convening authority did not have to review the "unwritten" R.C.M. 1105 submission.[44] The convening authority allegedly compounded this error by following the erroneous advice and by failing to "consider" the videotape as required by R.C.M. 1107(b)(3)(A)(iii).

In deciding the issue, the Court of Military Appeals compared R.C.M. 1105 with its statutory basis, Article 60(b)(1) of the Uniform Code of Military Justice.[45] Although R.C.M. 1105 limits the accused's right to consideration to "written" clemency submissions, Article 60(b)(1) does not include this restriction. Rather, Article 60(b)(1) refers only to the extremely expansive terms "submission[s]" and "matters." After reviewing the legislative history of Article 60 and finding no intent by its drafters to limit defense posttrial submissions to written material only, the Court of Military Appeals concluded that the staff judge advocate's advice was incorrect. The convening authority erred by failing to "consider" the videotape.

The court, however, refused to hold that the convening authority should have spent more than half an hour watching the entire videotape.[46] The Court of Military Appeals explained that all Article 60 requires of a convening authority is that he or she "consider" posttrial

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[32] *See* United States v. Craig, 28 M.J. 321 (C.M.A. 1989) (holding that either all defense submissions should be listed on the posttrial recommendation as enclosures or the convening authority should initial and date all defense submissions); *see also* United States v. Spurlin, 33 M.J. 443 (C.M.A. 1991).

[33] 33 M.J. 13 (C.M.A. 1991).

[34] Uniform Code of Military Justice art. 125, 10 U.S.C. § 925 (1988) [hereinafter UCMJ].

[35] UCMJ art. 134.

[36] *Davis*, 33 M.J. at 13.

[37] *Id.* at 14. The Court of Military Appeals quoted extensively from the notice that the trial counsel provided Airman Davis. The court emphasized that the notice advised Davis at least three times of his right to submit clemency "matter." *See id.* The notice did not differentiate between "matter" and "written matter." *See id.*

[38] *Id.*

[39] *Id.*

[40] *See* R.C.M. 1106(f)(7).

[41] *Davis*, 33 M.J. at 14.

[42] R.C.M. 1105(b) (emphasis added). The staff judge advocate also relied upon United States v. Barton, 6 M.J. 16 (C.M.A. 1978) (per curiam), which holds that a videotape is not an adequate substitute for a transcribed record of trial. *Id.* at 18. The wording of R.C.M. 1105, however, is more restrictive than R.C.M. 1107(b)(3)(A)(iii), which states the convening authority must consider "any matters" submitted under R.C.M. 1105 or R.C.M. 1106(f).

[43] *Davis*, 33 M.J. at 14.

[44] *Id.*

[45] UCMJ art. 60(b)(1).

[46] Government appellate counsel also argued that if the convening authority were required to watch this videotape, the Court of Military Appeals logically might have to expand this holding to require convening authorities to grant requests for personal audiences by the accused. *Davis*, 33 M.J. at 16.

submissions. Accordingly, the court held that the convening authority did not have to watch the videotape "in its entirety."[47] It concluded that the needs of justice would be served if the convening authority merely had "considered" the videotape.

What does "consider" mean? In *Davis* the court simply stated: "[W]e believe that Congress intended to rely on the good faith of the convening authority in deciding how detailed his [or her] 'consideration' must be."[48]

So what does "consider" *really* mean? Does it mean the convening authority can hold the videotape, still in its case, up to his forehead and "consider" it? Or, at a minimum, must the convening authority watch portions of the videotape? If the convening authority may watch only portions, how does the convening authority know which portions to watch? Must the staff judge advocate advise the convening authority on which parts are "worthwhile?" All *Davis* advises is that the convening authority may determine at his or her discretion how detailed a consideration will be.

Conclusion

Judge advocates may glean the following guidance from *Davis*:

1. After *Davis*, R.C.M. 1105(b) is inaccurate. Criminal law practitioners should open their Manuals for Courts-Martial to R.C.M. 1105 and line through the word "written" in paragraph (b). A convicted accused may submit a videotape as a postsentencing submission.

2. A staff judge advocate should ensure that the record of trial establishes that the convening authority received all timely defense submissions before he or she took action. The staff judge advocate should list all timely defense submissions as enclosures to the posttrial recommendation or addendum, or else the convening authority should initial and date all defense submissions.[49] At that point, the convening authority may determine the scope of his or her "consideration" of the matters that the accused has submitted.

3. The staff judge advocate should not attempt to define or restrict the scope of convening authority consideration in his or her posttrial recommendation. The convening authority alone may determine what constitutes adequate consideration of each submission.

4. When forwarding the correct number of copies of the record of trial for appellate review,[50] the staff judge advocate must forward at least one copy of an R.C.M. 1105 videotape to the appropriate appellate authority.[51] Additionally, the staff judge advocate should ensure that one copy of the R.C.M. 1105 videotape is kept within the staff judge advocate's office until appellate review is complete.[52] Major Cuculic.

Contract Law Note

CEO's Debarment Is Not Justified Under "Reason to Know" Standard

The United States Court of Appeals for the District of Columbia Circuit recently held that a Defense Logistics Agency (DLA) debarment action of a company president and chief executive officer (CEO) was improper because the agency record failed to substantiate the allegation that the CEO had had reason to know of his company's misconduct.[53]

Under the Federal Acquisition Regulation (FAR), a federal agency may debar a government contractor for committing fraud in the performance of a government contract or for any other offense that indicates a lack of business integrity.[54] The agency also may impute the contractor's improper conduct "to any officer, director, shareholder, partner, employee or other individual associated with the contractor who participated in, knew of, or had reason to know of the contractor's conduct."[55] The agency, however, must prove by a preponderance of the evidence that the individual to whom the agency would impute this misconduct actually had reason to know of it.[56]

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[47] *Id.* at 17.

[48] *Id.*

[49] *See* United States v. Hallums, 26 M.J. 838 (A.C.M.R. 1988); United States v. Craig, 28 M.J. 321 (C.M.A. 1989); United States v. Foy, 30 M.J. 664 (A.F.C.M.R. 1990); United States v. Godreau, 31 M.J. 809 (A.F.C.M.R. 1990).

[50] *See* R.C.M. 1103(g). Any videotapes forwarded with the record should be properly marked to describe their contents.

[51] Courts of military review may scrutinize videotapes when reviewing courts-martial for legal and factual sufficiency under UCMJ article 66. *See* United States v. Hall, CM 9003107 (A.C.M.R. 15 Nov. 1991). Logically, this rule also should apply to a court's reviews of sentences.

[52] Additionally, a staff judge advocate should consider including one copy of the videotape with each copy of the record of trial (if R.C.M. 1103 requires the staff judge advocate to furnish more than one copy). This will allow government appellate counsel, defense appellate counsel, and appellate courts to receive individual copies.

[53] Novicki v. Cook, No. 90-5206 (D.C. Cir. Oct. 15, 1991), 1991 U.S. App. LEXIS 23,720.

[54] Fed. Acquisition Reg. 9.406-2 (1 Apr. 1984) [hereinafter FAR].

[55] FAR 9.406-5(b).

[56] *Id.*

Novicki was president and CEO of a major manufacturer of metal film resistors and electronic components used in military weaponry and navigation systems, including the MX missile and the Global Positioning Satellite System. The company's contract with the DLA required the company to test its resistors continually and to inform the DLA of test failures and of customer-reported resistor failures. The vice president for resistors was directly responsible for their manufacture.[57]

After receiving several complaints about the resistors from company customers, the DLA conducted several audits. These audits revealed that the company had failed to report numerous customer complaints. The DLA referred the matter to the Defense Criminal Investigation Service (DCIS). The DCIS discovered that from 1982 to 1986, the company repeatedly had made false statements to the DLA about unreported test failures and customer complaints.[58] After reviewing the DCIS's findings, the DLA debarred Novicki for three years. It noted in particular that Novicki had taken no action to prevent the company's misconduct, even though his "status" with the company had placed him in a "position to discover the misconduct, report it to the Government, and take corrective action."[59]

Novicki appealed the agency's decision to the District Court for the District of Columbia. He argued that DLA's debarring official improperly had imputed the company's misconduct to him under a strict liability theory or a "should have known standard."[60] The district court disagreed. The court observed that the company's contract with the government had been of paramount importance to the company and that the complaints the company had received and the failures the company had noted were numerous and not of "minor importance." It added that Novicki, as company president and CEO, had been obliged to "keep informed of corporate activities and to exercise reasonable control and supervision over his subordinate officers."[61] Indeed, it found that he had had a "duty to seek out and remedy violations wherever they might occur."[62] Accordingly, the district court concluded that the agency had determined rationally that Novicki had had reason to know of his company's fraudulent activities and that the agency had debarred him properly.

Novicki appealed, arguing that the government had debarred him because he had held a particular position at the company and not because he actually had had reason to know of the misconduct. The court of appeals turned to the common law definition of "reason to know" to decide the appeal.[63] Under this definition, a person has reason to know a fact if he or she has information from which a person of ordinary intelligence would infer that the fact in question exists or that there is a substantial chance that it exists.[64] The court recognized that this definition does not impose upon an individual a duty to inquire, but merely requires him or her to draw reasonable inferences from information that he or she already knows.[65]

Examining the debarring official's application of the "reason to know" standard, the appeals court noted that the official had characterized the issue in terms of "whether Novicki was in such a responsible relationship to the misconduct as to have the power to prevent the misconduct by exercising the level of care and exertion that society would reasonably expect from someone in his position." The court remarked that because of his status at the company, "Novicki did have both a responsible relationship to the misconduct and the power to prevent it."[66] Elsewhere in the record, the debarring official had framed the issue as whether Novicki properly had "carried out his duty of inquiry." The court found that this language suggested that the DLA had misapplied the standard for imputation and had debarred Novicki because of his status as president and CEO of the company.

The court, however, acknowledged that other language in the debarring official's opinion suggested that the official had applied the common law definition correctly. The court discussed three additional facts that the debarring official had considered: complaints from the field about the resistors, two DCIS searches of company documents, and the DLA's reduction of the company's qualified products list (QPL) rating for the resistors.[67] It noted that the debarring official had found that the "number of complaints, the similarity of the problems, and the continuing nature of the problems were sufficient notice to a reasonable, responsible executive in Mr. Novicki's

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[57] *Novicki*, 1991 U.S. App. LEXIS 23,720 at *2 to *3.

[58] The district court found that the company had made 42 false statements by failing to report 15 instances of resistor failure in quality control tests and that it had failed to report approximately 1350 instances of resistor failure reported by customers. Novicki v. Cook, 743 F. Supp. 11, 12 (D.D.C. 1990).

[59] *Novicki*, 1991 U.S. App. LEXIS 23,720, at *4.

[60] *Id.* at *5.

[61] *Novicki*, 743 F. Supp. at 8.

[62] *Id.*

[63] The FAR does not define this standard.

[64] Restatement (Second) of Agency at 9, cmt. d.

[65] *Id.*

[66] *Novicki*, 1991 U.S. App. LEXIS 23,720 at *5.

[67] Listing on a qualified products list indicates that a product has been examined and tested, and that it satisfies all government requirements.

position that there could be systemic problems with [the company's] production."[68]

Taken as a whole, the standard that the debarring official applied appeared ambiguous. The court, however, found no need to rule on whether the DLA actually had applied the correct standard. Instead, it held that—even assuming that the DLA had applied the proper standard—the record did not support, by a preponderance of the evidence, the agency's contention that Novicki had had "reason to know" of the improper conduct. The record showed that the alleged wrongful acts had occurred for four years before Novicki became aware of any misconduct. The court noted that "[n]othing in the record indicate[d] that Novicki [had] acquired any relevant information while the misconduct was still occurring," and that Novicki had become "generally aware" of customer complaints only in the latter part of 1986.[69]

This decision demonstrates that to prevail in a debarment or suspension action, an agency properly must develop and document the facts. Here, the court declined to determine whether the agency had misapplied the legal standard because the findings of fact did not support an imputation of misconduct under the "reason to know" standard.[70] Although contracting officers may bear the burden of recommending debarment and of filing the necessary reports to debarment officials,[71] contract attorneys always should review reports for thoroughness and clarity and should ensure that they state a proper basis for the proposed debarment action. Major Killham.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally-published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*. Send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Legal Assistance Generally

Checklist for the New Legal Assistance Attorney[72]

A new judge advocate often is assigned initially to a legal assistance office (LAO) as a legal assistance attorney (LAA). Fresh from the basic course, the new judge advocate has received substantive instruction in the most frequently encountered legal assistance topics[73] and should be well prepared to begin providing legal assistance in these areas.

Upon arrival at the LAO, the LAA's supervisor will provide him or her with an office orientation and will introduce the new attorney to his or her co-workers. After settling into the office, the new LAA may become a contributing LAO team member more quickly if he or she accomplishes the following tasks.

Read All Pertinent Publications

The new attorney carefully should read Army Regulation 27-3;[74] Department of the Army Pamphlet 27-26;[75] Army Regulation 25-50;[76] and the Legal Automation Army-Wide System (LAAWS) legal assistance module deskbook.[77] Understanding the contents of these publications is crucial to the successful discharge of legal assistance duties.[78]

Read the SOP

Every legal assistance office should have a standard operating procedure (SOP). The SOP outlines most of the basic information about the office that a new LAA may need to know immediately—for example, the office's organization, hours, duties, and resources.

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[68] *Novicki*, 1991 U.S. App. LEXIS 23,720 at *6

[69] *Id.*

[70] *Id.* at *7.

[71] Defense Fed. Acquisition Reg. Supp. 209.472 (1 Apr. 1984).

[72] *See* Legal Assistance Branch, Administrative and Civil Law Division, The Judge Advocate General's School, U.S. Army, JA 271, Office Administration Guide (Sept. 91) [hereinafter Office Administration Guide] (setting forth a checklist for new legal assistance attorneys upon which the author based this note). The Judge Advocate General's School distributed this publication to legal assistance offices Army-wide in a December, 1991 mailout.

[73] Basic course students receive the following legal assistance instruction: legal assistance administration and programs, basic tax issues for military personnel, divorce taxation, family law, Uniformed Services Former Spouses' Protection Act, survivor benefits, state taxation, will drafting and estate planning, federal consumer protection law, Soldiers' and Sailors' Civil Relief Act, landlord-tenant law, officer and noncommissioned officer evaluations, appeals of officer and noncommissioned officer evaluations, and interviewing and counseling. Instruction also includes practical exercises in interviewing and counseling, will drafting using the Legal Automation Army-Wide System (LAAWS), and separation agreement drafting.

[74] Army Reg. 27-3, Legal Services: Legal Assistance (10 Mar. 1989).

[75] Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers (31 Dec. 1987) [hereinafter DA Pam. 27-26].

[76] Army Reg. 25-50, Preparing and Managing Correspondence (21 Nov. 1988).

[77] Legal Assistance Branch, Administrative Law and Civil Division, The Judge Advocate General's School, U.S. Army, The LAAWS 003.1 User's Reference Manual, Legal Assistance Module (Jan. 1991).

[78] A new LAA will want to review the LAO's inventory of publications that have been provided by the Legal Assistance Branch, Administrative and Civil Law Division, The Judge Advocate General's Corps School, U.S. Army. Periodically, the Judge Advocate General's School distributes to LAOs practical publications on a variety of subjects, such as wills and estate planning, the Soldiers' and Sailors' Civil Relief Act, or deployment. New LAAs will find these publications are real time-savers in issue identification and resolution.

Read the Office Handbook

Most LAOs also maintain handbooks on local law and procedure that they have compiled themselves or have obtained from local bar associations. A new LAA should read his or her office's handbook to learn any unusual local laws.

Consult the LAO NCOIC or Civilian Paralegal

The LAO noncommissioned officer in charge (NCOIC) should brief the new LAA on the office's enlisted personnel and their responsibilities. The NCOIC also should provide the new attorney with samples of standard correspondence and forms used in the office.

A legal assistance office with civilian paralegals and attorneys generally has an excellent institutional memory. These civilians usually will have been in the office for several years and will be familiar with common issues and problems, as well as many practical solutions and permissible shortcuts. Their advice and assistance can speed a new LAA's transition into everyday operations.

Legal Assistance Office Reading Files

Legal assistance offices commonly maintain reading files—that is, actual case files from which all personal data, such as the clients' names and social security numbers, have been redacted. A new attorney often can obtain several weeks or months of recent reading files. By reviewing these files, he or she can identify the matters that the other LAAs in the office have handled frequently and can become familiar with appropriate formats, phraseology, and the correspondence errors that the office strives to avoid.

Observe Client Interviews

Any good training program capitalizes on the experience of others. Seasoned LAAs should encourage a new attorney to observe several client interviews. After each interview, the more experienced LAA should answer any questions the new LAA may have on the interview or on the legal advice rendered. After several interviews, the new attorney should conduct client interviews and consultations in the presence of the more experienced LAA. Thereafter, the two lawyers should discuss the interview process for the benefit of the new LAA.

Question Colleagues

To the extent that the ethical restrictions of confidentiality permit, a new LAA should ask colleagues questions about the issues and problems that he or she encounters while counselling clients. Asking questions is one of the best ways to narrow research and focus on the needs of specific clients.

Conclusion

In addition to focusing on the tasks mentioned above, new LAAs also should look to their supervisors for supplemental guidance as they strive to render professional advice. This combined approach is but one way to ensure that the new LAA gets off to a good, quick start in providing quality legal assistance. Major Hancock.

Professional Responsibility Notes

These notes provide legal assistance attorneys and their supervisors with a practical approach to resolving professional responsibility issues that may arise when providing legal assistance.[79] Judge advocates should try to resolve these issues by reviewing the Rules of Professional Conduct for Lawyers.[80] In most cases, legal assistance attorneys also should discuss the resolution of these issues with their supervisors.[81]

Client Confidentiality and Domestic Relations

Legal assistance clients frequently seek advice on domestic relations matters. While discussing the case with a legal assistance attorney, a client may disclose information that is particularly harmful to the other spouse and, simultaneously, may ask the attorney not to reveal this information to the spouse's chain of command.

Assume, for example, that a client has sought your advice on divorcing her military spouse. During your consultation, she informs you that she has evidence that

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[79] Legal assistance office chiefs and supervisors also may find this note useful in discharging their supervisory responsibilities under Army Rule 5.1. *See generally* Dep't of Army, Pam. 27-26, Legal Services: Rules of Professional Conduct for Lawyers, Rule 5.1 (31 Dec. 1987) [hereinafter Army Rule]. The Office Administration Guide, *supra* note 72, includes an outline oriented toward legal assistance and typical problems involving professional responsibility. The Visual Information Branch of The Judge Advocate General's School, U.S. Army, also has available a one-hour videotape, entitled *Professional Responsibility*. In this tape, Major Bernard P. Ingold, former Chief of the Legal Assistance Branch, TJAGSA, presents an overview of the Army Rules of Professional Conduct for Lawyers and discusses the Army Rules that relate directly to legal assistance issues. Legal assistance offices may obtain a copy of this tape by writing to TJAGSA, ATTN: Visual Information Branch (JAGS-IM-V), 600 Massie Road, Charlottesville, VA 22903-1781. Requestors must furnish a videocassette (either 3/4-inch or 1/2-inch) and request this tape: JA-88-0061A, Professional Responsibility.

[80] DA Pam. 27-26; *see also* Bernard P. Ingold, *An Overview of the New Army Rules of Professional Conduct for Lawyers*, 124 Mil. L. Rev. 1 (1989).

[81] Prudent practice—and many legal assistance office standing operating procedures—dictate that a new legal assistance officer should discuss even simple ethical issues with his or her supervisor.

her spouse is involved in a "black marketing" conspiracy in his unit. At the same time, however, she urges you not to reveal this information to her spouse's commander.[82] What actions do the Army Rules of Professional Conduct for Lawyers permit you to take?

As a general rule, Army Rule 1.6[83] provides that a lawyer must not reveal any information relating to representation of a client. The Army rule, however, does recognize some exceptions. Counsel may disclose confidential information if the client expressly consents to the disclosure.[84] An attorney also may reveal a confidence to establish a claim or defense in a controversy with a client.[85] Neither exception, however, applies to the instant case.

The Army Rules actually *require* an attorney to reveal confidential information

> to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system.[86]

After reviewing the Army Rules, the attorney should conclude that the limited facts related by the client do not support the inference that the actions of the client's spouse significantly impair either national security or the readiness of his unit. The ethical rule, therefore, should not compel the LAA to disclose the information. The legal assistance attorney's supervisor likely will confirm this conclusion.[87] Accordingly, nondisclosure would be the ethically correct resolution in this case.

High Technology and Confidentiality

Mindful of Army Rule 1.6 on confidentiality, legal assistance attorneys should exercise caution when they use high technology equipment, such as cordless cellular telephones or fax machines, to communicate with their clients. Information that a client conveys to an attorney by means of these instruments can be intercepted by third parties, thereby jeopardizing the confidentiality of the attorney-client relationship.

Recently, the Illinois State Bar Association Committee on Professional Responsibility[88] rendered an opinion on an attorney's duty to protect client confidentiality when communicating with a client using a wireless telephone. The opinion recognized that communications via mobile telephones are susceptible to interception and that participants in conversations using this sort of equipment have no reasonable expectation of privacy. Accordingly, the committee opined that these communications are protected by neither the attorney-client privilege, nor the rule on confidentiality. The committee concluded that an attorney should caution his or her client on the possible loss of confidentiality and the attorney-client privilege if the attorney is aware that he or she and the client are communicating via a mobile phone.[89]

The same confidentiality caution should apply when a lawyer uses a fax machine to transmit information to a client. A legal assistance attorney should not fax confidential documents, such as separation agreements or legal opinions, to a client unless the client has approved the use of this medium of communication.[90] Major Hancock.

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[82] This scenario and approach, developed by Major Bernard Ingold, appear in Office Administration Guide, *supra* note 72.

[83] Army Rule 1.6 provides:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
>
> (b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system.
>
> (c) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceedings concerning the lawyer's representation of the client.

[84] Army Rule 1.6. Of course, the Army rules implicitly authorize an Army lawyer to disclose information about a client when disclosure is appropriate to representing the client, unless the client specifically has instructed the lawyer not to release the information or special circumstances otherwise limit the lawyer's implicit disclosure authority. *See* Army Rule 1.6, comment. This comment also provides that "[l]awyers may disclose to supervisory lawyers within the office and to paralegals, subject to the direction and control of the lawyer or the lawyer's supervisory lawyer, information relating to a client, unless the client has instructed that particular information be confined to specified lawyers, or unless otherwise prohibited ...." DA Pam. 27-26 at 10.

[85] Army Rule 1.6(b).

[86] *Id.*

[87] The attorney, of course, properly could discuss the matter with his or her supervisor to reach an ethical resolution. *See* Army Rule 1.6, comment.

[88] Illinois State Bar Ass'n Comm. on Professional Ethics, Op. 90-7 (Nov. 26, 1990) *reprinted in* American Bar Ass'n, ABA/BNA Lawyers' Manual on Professional Conduct, vol. 7, No. 3, Mar. 13, 1991, at 49.

[89] *Id.*

[90] *See* Rule 1.4(b) (outlining an attorney's responsibility to explain to his or her client that communication using wireless telephones or common-user fax machines could result in the loss of the attorney-client privilege because of a lack of confidentiality).

Consumer Law Note

Federal Communications Commission Adopts Rules Governing Interstate "900" Telecommunications Services

This article updates a previous legal assistance note concerning telemarketing and "900" numbers.[91] Recently, the Federal Communications Commission (FCC) published new rules, effective 2 December 1991, in response to numerous consumer complaints about pay-per-call services.[92] Pay-per-call services[93] include all services offered through the use of 900 numbers.

The FCC rules, which expressly preempt state requirements,[94] require pay-per-call services, or "information providers," to transmit to callers a message preamble that relates the information provider's name, the cost of the call, and a general description of the information, product, or service offered. After making these disclosures, the services must give callers a "reasonable opportunity" to hang up before billing charges begin.[95] If the general description in a information provider's preamble is false or misleading or if the provider subsequently renders poor quality services, aggrieved consumers may address their complaints to the Federal Trade Commission (FTC) or to state agencies responsible for investigating deceptive practices.[96]

The FCC received many complaints about children using 900 numbers without their parents' consents. Consequently, the FCC has provided that programs aimed at children under the age of eighteen must contain special warnings that the caller should hang up unless he or she has parental permission to use the service.[97] Even if an information provider's message contains this statement, however, a consumer may seek relief for unfair and deceptive practices—as is evidenced by a 24 July 1991, FTC complaint against Teleline, Inc., a pay-per-call service that targeted its advertising toward children.

During television broadcasts, Teleline encouraged children to call its 900 number to get free toys or posters, stating that the telephone call would cost only $2.45. The FTC, however, found that the costs of calls often exceeded that amount and that callers had to take additional steps to get the promised gifts. Finding this conduct unfair and deceptive, the FTC stated that "the admonition in respondent's advertisement that children should seek parental permission before calling did not provide reasonable means for persons responsible for payment of these charges to exercise control over the transaction."[98]

In a subsequent consent order, Teleline agreed to cease making misrepresentations regarding gifts and the costs of telephone calls, to include in its telephone communications a clearly-worded preamble that gives children an opportunity to hang up with no charge, and to provide a reasonable means for parents to prevent, or not be charged for, a child's unauthorized calls.[99] Teleline also must give one-time refunds or credits for unauthorized calls by children. Further, it must contract with local carriers to identify on telephone bills all calls that were placed by children and to include a toll free number for inquiries about the calls. These contracts also must require each carrier to notify its customers that they may obtain "900 call blocking" if this option actually is available.[100]

The FCC also addressed call blocking in its new rules. When technically feasible, local exchange carriers must provide free one-time 900 call blocking to their residential subscribers. A subscriber's subsequent request to remove a block must be in writing. The FCC took no action to prevent carriers or information providers from unilaterally blocking 900 services to consumers who have failed to pay for past uses of these services, but it did forbid telephone companies to disconnect consumers' telephone services for failure to pay 900 call charges because these charges are unrelated to transmission services.[101]

Because customers may refuse to pay pay-per-call charges and still receive phone services, "sellers" must pursue debt collection through other avenues. The FCC

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[91] TJAGSA Practice Note, *Telemarketing and 900 Numbers*, The Army Lawyer, Aug. 1991, at 43.

[92] Interstate 900 Telecommunications Services., 56 Fed. Reg. 56,160 (1991) (to be codified at 47 C.F.R. pts. 64, 68).

[93] Pay-per-call services are telecommunications services which permit simultaneous calling by a large number of callers to a single telephone number and for which the calling party is assessed, by virtue of completing the call, a charge that is not dependent on the existence of a presubscription relationship and for which the caller pays a per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call.

Id. at 56,165 (to be codified at 47 C.F.R. § 64.709).

[94] *Id.* at 56,164 (47 C.F.R. § 64.709, discussion).

[95] *Id.* at 56,165 (to be codified at 47 C.F.R. § 64.711(c)).

[96] *Id.* at 56,161 (47 C.F.R. § 64.711(c), discussion).

[97] *Id.* at 56,165 (to be codified at 47 C.F.R § 64.711(d)).

[98] Teleline, Inc., No. C-3337 (Federal Trade Comm'n July 24, 1991); *see also* Teleline, Inc., 56 Fed. Reg. 22,432 (1991).

[99] Teleline, Inc., 56 Fed. Reg. 38,446 (1991).

[100] Teleline, Inc., 56 Fed. Reg. 22,432 (1991).

[101] Interstate 900 Telecommunication Services., 56 Fed. Reg. at 56,166 (to be codified at 47 C.F.R. § 64.714).

declined to regulate these activities, stating simply that information providers and carriers must pursue debt collection as a private commercial dispute.[102] The Fair Debt Collection Practices Act[103] already protects consumers against unfair or coercive collection efforts, as do many state consumer protection statutes. Major Hostetter.

Family Law Note

Use of Premarital Agreements

Colonel Jones walks into your office one day and says:

> Currently, I'm divorced. Six years ago, however, I was married to a woman with whom I had three children. Now I'm planning to remarry. My divorce, however, nearly cleaned me out financially. How can I be sure that, if I divorce again, I won't be financially destroyed a second time? Also, how can I ensure that the children from my first marriage, and not my new wife, will receive my estate after I die?

One way to address Colonel Jones' concerns is through the use of a premarital, or antenuptial, agreement. A properly drafted premarital agreement can cover the entire spectrum of issues that are likely to arise upon divorce or after the death[104] of one or both spouses. The parties to a premarital agreement can condition their respective rights and obligations concerning particular assets on the occurrence or non-occurrence of various events.[105] Moreover, some jurisdictions will allow a couple to resolve the issue of spousal support upon dissolution of the marriage in advance through the use of a premarital agreement.[106]

At the turn of the century, courts almost universally refused to recognize the validity of premarital agreements. Most courts cited public policy concerns to hold premarital agreements void per se, asserting that they implicitly encouraged divorces. Over the last thirty years, however, many jurisdictions have rejected this precept. Undoubtedly, this is due in large part to society's waning support for the concept of "until death do you part." As one court noted,

> There can be no doubt that the institution of marriage is the foundation of the familial and social structure of our Nation and, as such, continues to be of vital interest to the State; but we cannot blind ourselves to the fact that the concept of the 'sanctity' of marriage—held by our ancestors only a few generations ago, has been greatly eroded in the last several decades.[107]

Today, many jurisdictions aver that judicial recognition of the validity of premarital agreements is good public policy.[108] Only when a court construes an agreement as actively encouraging one or both of the parties to seek divorce is it likely to hold the agreement void on public policy grounds.[109]

Few legal assistance offices have either the time or the expertise to draft premarital agreements. Nevertheless, because many soldiers marry more than once, legal assistance attorneys must be prepared to advise clients on the efficacy of these agreements. At a minimum, legal assistance attorneys should counsel clients that are considering premarital agreements about the following practical considerations.

Today, courts evaluate premarital agreements primarily for their validity as contracts. A court is particularly likely to hold a premarital agreement unenforceable if one of the parties convincingly alleges that he or she was induced to enter into the agreement through fraud, duress, or undue influence. Legal assistance clients must understand that a premarital agreement is not a vehicle for hiding assets from a prospective spouse. As one court stated, "The relationship between the parties to an antenuptial agreement is one of mutual trust and confidence. Since they do not deal at arms' length, they must exercise a high degree of good faith and candor in all matters bearing upon the contract."[110] A client should realize that his or her failure to disclose the existence of substantial

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[102] *Id.* at 56,163 (47 C.F.R. § 64.714, discussion).

[103] 15 U.S.C. § 1692 (1988); *see also* Legal Assistance Branch, Administrative and Civil Law Division, The Judge Advocate General's School, U.S. Army, JA 265, Consumer Law (Sept. 1989).

[104] Clients must understand that premarital agreements are essentially estate planning devices. To avoid discrepancies between a premarital agreement and other estate documents that in time could lead to a court challenge, each client must ensure before the premarital agreement is drafted that the attorney that drafts the agreement is apprised fully of any existing wills and trusts.

[105] This issue is particularly important when a client is subject to the jurisdiction of a court in a state in which a divorce court may divide all his or her property, regardless of whether the client acquired this property before his or her marriage or with his or her separate assets. Most states, however, exclude from a divorce court's jurisdiction property that a party brought into the marriage or inherited.

[106] *See, e.g., In re* Dawley, 551 P.2d 323 (Cal. 1976); Unander v. Unander, 506 P.2d 719 (Or. 1973); Posner v. Posner, 233 So. 2d 381 (Fla. 1970), *rev'd on other grounds*, 257 So. 2d 530 (Fla. 1972).

[107] *Posner*, 233 So. 2d at 384.

[108] *See, e.g.*, Button v. Button, 388 N.W.2d 546, 548 (Wis. 1986). In *Button* the court stated,

> The legislature has recognized that prenuptial and postnuptial agreements dividing property serve a useful function. They allow parties to structure their financial affairs to suit their needs and values and to achieve certainty. This certainty may encourage marriage and may be conducive to marital tranquility by protecting the financial expectations of the parties. *Id.*

[109] *See, e.g.*, Neilson v. Neilson, 780 P.2d 1264 (Utah Ct. App. 1989) (holding prenuptial agreement void because it provided the husband with an incentive to seek a divorce at the earliest possible date); Ludwig v. Ludwig, 693 S.W.2d 816 (Mo. Ct. App. 1985) (holding that an agreement between a married woman and the man she intended to marry after divorcing her current husband, which would provide her with half of her future husband's property, encouraged divorce and, therefore, was void).

[110] Del Vecchio v. Del Vecchio, 143 So. 2d. 17, 21 (Fla. 1962).

assets, including a potential interest in retirement benefits, ultimately may invalidate the agreement.

A legal assistance client also must understand that a premarital agreement is not a vehicle for luring a prospective spouse into an unfair division of assets. Courts tend to examine the agreements for unfairness in three ways.

First, a court commonly will inquire into the fairness of the negotiations that led to an agreement. Surprising a prospective spouse shortly before the wedding with a premarital agreement, coupled with a threat to call off the wedding unless the agreement is signed, often meets with a court's disfavor.[111] Courts seem more concerned, however, with the issue of whether both spouses were represented by counsel at the time of the agreement's negotiation.[112] To prevent overreaching, some courts have ruled that an agreement concluded after negotiations in which one party was not represented by counsel will be subject to stricter scrutiny than an agreement for which both parties had legal representation.[113]

Second, a court occasionally will determine whether the agreed-upon division of property between the parties is fair. Because premarital agreements are contracts, an aggrieved spouse may use the doctrine of unconscionability to defeat a particularly one-sided arrangement. Moreover, some jurisdictions have expressed a more expansive view, holding that a court may review and alter a premarital agreement sua sponte to detect and prevent an unfair result. As the Wisconsin Supreme Court noted in *Button v. Button*, "While [state law] embodies the public policy of freedom of contract, it also empowers a divorce court to override the parties' agreement if the agreement is inequitable."[114]

Third, a court sometimes will require an agreement to be fair not only when it is executed, but also when it is enforced. Thus, a legal assistance client should understand that a substantial change in the parties' financial circumstances between the date that they signed the agreement and the date that the agreement is enforced may result in a court setting the agreement aside. Indeed, a court well may set aside an agreement if it finds that "the premises upon which [the agreement] originally [was] based have so drastically changed that enforcement would not comport with the [original] reasonable expectation[s] of the parties."[115]

Finally, a client must understand that any actions he or she takes during the marriage may alter the terms of the premarital agreement. The parties essentially must adhere to the terms of the agreement throughout the marriage to guarantee that a court will enforce it upon the dissolution of their marriage or upon the death of one of the parties. For example, in *Jensen v. Jensen* the parties' conduct during their marriage led a court to disregard their premarital agreement.[116] The Jensens had agreed in a premarital agreement to treat their respective incomes as separate property. They later opened a joint account, however, into which they deposited their respective incomes to pay their joint expenses. In a subsequent divorce action, the wife petitioned the court for return of the money she had deposited in the joint account, citing the terms of the premarital agreement. The court, however, noted that the wife voluntarily had ignored the separation agreement's terms and denied her claim.

Premarital agreements clearly do not enhance the romantic atmosphere that normally surrounds a couple considering marriage. For clients like Colonel Jones, however, a carefully negotiated premarital agreement can forestall the financial disasters that otherwise could result if the bloom ultimately falls off their romances. Major Connor.

Tax Notes

Legal assistance attorneys should find the following tax information useful in preparing tax oriented announcements or handouts for the upcoming tax filing season.

Income Tax Withholding for Puerto Rico Residents

A recent agreement between the Treasury Department and the Commonwealth of Puerto Rico requires federal agencies to withhold Puerto Rico taxes in lieu of federal income taxes from the wages of Puerto Rico residents. Prior to this agreement, Puerto Rico income taxes were not withheld and federal income taxes were.

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[111] *See* Norris v. Norris, 419 A.2d 982 (D.C. App. 1980). *But see* Howell v. Landry, 386 S.E.2d 610 (N.C. App. 1989) (holding that a husband's "eleventh hour" demand that his wife sign premarital agreement did not constitute duress because she could have postponed the marriage or could have insisted upon the opportunity to consult with an attorney).

[112] *See, e.g.*, Frielander v. Frielander, 494 P.2d 208 (Wash. 1972); *see also* Orgler v. Orgler, 568 A.2d 67 (N.J. Super. Ct. App. Div. 1989) (refusing to apply a prenuptial agreement against a wife who did not understand the state's equitable distribution law—even though, before entering into the agreement, she had consulted with an independent counsel who had advised her expressly not to sign it).

[113] *See* Gant v. Gant, 329 S.E.2d 106 (W. Va. 1986).

[114] 388 N.W.2d at 548.

[115] McKee-Johnson v. Johnson, 444 N.W.2d 259 (Minn. 1989).

[116] 753 P.2d 342 (Nev. 1988).

The Defense Finance and Accounting Service will withhold Puerto Rico taxes from the wages of soldiers who list their home of record as Puerto Rico. For many military Puerto Rican residents, the new withholding rules will result in greater withholdings from their salaries and, possibly, an obligation to file Puerto Rico tax returns for the first time.

The Puerto Rico tax scheme is based on a taxpayer's gross income. A taxpayer may choose a standard deduction,[117] or may itemize deductions. Puerto Rico taxpayers also are allowed an exemption deduction.[118] The 1990 Puerto Rico tax rates varied from approximately nine percent on taxable incomes of $2000 to approximately twenty-five percent on taxable incomes over $30,000.

Legal assistance attorneys should anticipate that some military Puerto Rican residents will change their domicile to stop withholding of Puerto Rico taxes. Soldiers desiring to change their withholdings may do so through their finance offices. These soldiers, however, may experience one or more of the following problems:

- they will have to file a Puerto Rico tax return for 1991 to obtain a refund of the monies that previously were withheld;
- they must convince Puerto Rican authorities that they actually were not Puerto Rico residents for tax purposes during most of 1991 or 1992, depending on when they changed their domicile;
- because the finance center probably will withhold insufficient taxes—or no taxes at all—for the states the soldiers claim as their new domicile, they may have to pay taxes to their new state at the end of the year to avoid penalties;
- because the finance center will have withheld taxes for Puerto Rico, but not for the federal government, the soldiers may owe substantial sums in unpaid federal income tax.

Puerto Rican resident-soldiers probably will find the withholding from their 1991 wages insufficient to meet their Puerto Rico income tax liability for the entire year. Accordingly, they still will owe taxes to Puerto Rico. Moreover, even though they will owe very little—if any—federal income taxes, they will have to file federal returns before the federal government will refund the monies that it withheld from their wages. Lieutenant Colonel Forrester.

1991 Federal Income Tax Tips for Post Bulletins

Legal assistance attorneys may find the following fifty tax tips suitable for publishing in post bulletins during the tax season.[119]

1. *TAX TIP*: **Should I send in my tax return using my leave and earnings statement?**

   No! The Internal Revenue Service (IRS) considers the Form W-2, Wage and Tax Statement, to be the official statement of how much you earned and how much you paid to the government as taxes during the year.

2. *TAX TIP*: **When should I receive my Form W-2 from my employer?**

   You should receive your W-2 no later than 31 January 1992. By federal law, your employers have until this date to furnish you with this form.

3. *TAX TIP*: **When should I receive my statements of dividends and interest from my financial institutions?**

   You should receive these statements no later than 31 January 1992. By federal law, your financial institutions have until this date to furnish you with these documents.

4. *TAX TIP*: **What should I do if I do not receive a Form W-2 from my employer, or statements of dividends and interest from my financial institution, by 31 January 1992?**

   Write your employer or the financial institution. If this fails, write the IRS Center that services the employer or the financial institution and complain. You can obtain addresses for IRS Centers nationwide from your local legal assistance office.

5. *TAX TIP*: **The W-2 I received in the mail has a huge computer error! It shows I earned $200,000 rather than $20,000. Can I just ignore the extra zero?**

   You should not—unless you want to hear from the IRS. Because your employer sent the same form to the IRS, the IRS will expect you to pay income tax

[117]The 1990 standard deductions were $2000 for single taxpayers and $3000 for married taxpayers.

[118]In 1990, the exemption deductions were $1300 for single taxpayers and $3000 for married taxpayers.

[119]Legal assistance attorneys should consult JA 269, Tax Information Series (Jan. 1992), published annually by the Legal Assistance Branch, Administrative and Civil Law Division, The Judge Advocate General's School, U.S. Army. This publication contains a series of camera-ready tax information handouts that legal assistance offices may reproduce and distribute during the tax season. The Legal Assistance Branch developed these handouts from materials provided by the Internal Revenue Service; Army Legal Assistance, Office of The Judge Advocate General (DAJA-LA); other Army legal assistance offices; the U.S. Air Force Preventive Law and Legal Aid Group; and many other contributors. Please forward your ideas for additional topics to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, 600 Massie Road, Charlottesville, Virginia 22903-1781.

on $200,000. Contact your employer and ask for a revised W-2.

6. *TAX TIP*: **When do I have to make a contribution to an individual retirement account (IRA) for a deduction on my 1991 tax return?**

   Stateside and overseas taxpayers have until 15 April 1992 to contribute to an IRA. Soldiers stationed in a combat zone who have yet to file their federal income tax return may be entitled to a longer period.[120] They should contact a legal assistance officer if they desire to contribute to an IRA.

7. *TAX TIP*: **Can I claim an IRA deduction on my tax return even though I actually have not created an IRA yet?**

   Yes, *if* you actually create an IRA not later than 15 April 1992.

8. *TAX TIP*: **What is the filing date for taxpayers overseas?**

   If you live, and primarily work, outside the United States or Puerto Rico on 15 April 1992, you have until 15 June 1992 to file your return. Simply mark on the outside of your envelope: "Outside the U.S. on 15 April 1992," to take advantage of this automatic extension. *NOTE*: Taxpayers who merely are traveling outside the United States or Puerto Rico on 15 April 1992 no longer are entitled to an automatic two-month filing extension.

9. *TAX TIP*: **If my move to a new assignment began in 1991 and ended in 1992, when must I file my moving expenses?**

   You have two choices—you may file all your moving expenses on your 1991 tax return or you may file your 1991 expenses on your 1991 return and your 1992 expenses on your 1992 return. The Tax Reform Act of 1986 made moving expenses an itemized deduction, so you must complete Schedule A, Itemized Deductions, as well as either Form 3903, Moving Expenses, or Form 3903F, Moving Expenses (Foreign Travel), and file them along with your income tax return (Form 1040).

10. *TAX TIP*: **What form should I use to file for my moving expenses?**

    You should use Form 3903 to file your moving expenses if you moved from one point to another within the United States. If you moved to, or from, a foreign country, you should use Form 3903F. Using Form 3903F allows you to claim more moving expense deductions than you can with Form 3903.

11. *TAX TIP*: **How long do I have to reinvest my gain from the sale of my old personal residence into a new personal residence?**

    Civilians have two years to reinvest (four years if overseas), while service members have four years to reinvest, whether they are stationed stateside or overseas. A soldier that moves overseas after selling his or her home has up to eight years to reinvest the gain from the sale.

12. *TAX TIP*: **How much of a charitable contribution can I deduct without itemizing?**

    None. You can claim charitable contribution deductions only by itemizing—that is, by using Schedule A.

13. *TAX TIP*: **How can I claim the out of pocket expenses I incur in traveling from place to place during my work day?**

    Using Schedule A and Form 2106, Employee Business Expenses, you may list your actual travel expenses—or you may claim a flat 27.5 cents per mile if you use your privately owned vehicle (POV).

14. *TAX TIP*: **How do I report the employee business expense deduction?**

    To claim these expenses you must itemize, using Form 2106 and Schedule A.

15. *TAX TIP*: **Where do I mail in my tax return if I am an overseas taxpayer?**

    You should send your return to Internal Revenue Service Center, Philadelphia, Pennsylvania 19255.

16. *TAX TIP*: **Can I deduct my unreimbursed travel expenses in using my POV to conduct charity work?**

    Yes. You may deduct either your actual expenses or use a flat rate of twelve cents per mile, plus tolls and parking fees. Some restrictions apply, however, if your travel involves being away from your home—that is, for example, if you take a trip to another state to perform charitable services. If you want to deduct your travel expenses under these circumstances, your travel must involve no significant element of personal pleasure, recreation or vacation. Furthermore, you can take charitable contribution deductions only by itemizing, using Schedule A.

17. *TAX TIP*: **Did Congress pass any new laws changing the tax on capital gains?**

    No. For tax year 1991, the federal government will tax all capital gains at the top rate of twenty-eight percent, even if the taxpayer is in a higher bracket.

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[120] *See* TJAGSA Practice Note, *IRA Contributions by Desert Storm Personnel*, The Army Lawyer, Sept. 1991, at 35.

18. *TAX TIP*: **If I am renting out a home, over how many years can I depreciate the structure?**

The length of the depreciation depends on when you purchased the house and when you started renting it out. Depending on the answers to these questions, you may depreciate the structure over fifteen, eighteen, nineteen, or 27.5 years. Homes rented out after 1986, however, *must* be depreciated over 27.5 years.

19. *TAX TIP*: **Can military personnel not report housing allowances as income and still take deductions for their mortgage interest payments and real estate taxes?**

Yes. The Tax Reform Act of 1986 created a specific statutory right for military members to do this.

20. *TAX TIP*: **How much money earned overseas as an employee of the federal government is excludable as foreign earned income (FEI)?**

None. Foreign earned income never includes income you earn as an employee of the United States Government, even if you earn it while stationed overseas.

21. *TAX TIP*: **Is money I earn while teaching for an American university overseas excludable as FEI?**

Yes. If you meet the residency test or physical presence test requirements, you can exclude this money from your taxable income.

22. *TAX TIP*: **Is money I earn while baby-sitting in an overseas area excludable as FEI?**

Yes. If you meet the residency test or physical presence test requirements, you can exclude this money from your taxable income.

23. *TAX TIP*: **Is money I earn while teaching a course overseas excludable as FEI?**

Probably, yes. If you are an independent contractor—like many overseas course instructors—rather than an employee of the United States Government and you meet the residency test or physical presence test requirements, you can exclude this money from your taxable income.

24. *TAX TIP*: **I sold a house and bought a new one last year. The new house cost more than the old one, so I know no taxes are due. Do I have to file any forms with the IRS about the sale, anyway?**

Yes. File Form 2119, Sale or Exchange of Personal Residence, with your tax return. Among other things, this form shows how much profit you made on the sale. Although federal law permits you to defer the tax on the gain from the sale because you bought a new house, your basis in the new house is reduced by the amount of untaxed profit from the old one.

25. *TAX TIP*: **What do I do with an overweight charge I received in 1991 for a previous year's permanent change of station (PCS) move?**

You should deduct the charge from your 1991 tax return using Schedule A and Form 3903 or Form 3903F. You do not amend the tax return of the year you had the PCS move.

26. *TAX TIP*: **May I deduct as a moving expense the cost of the transformers I bought when I moved overseas?**

No. The IRS views the purchase of transformers as a personal expenditure that has no tax ramifications.

27. *TAX TIP*: **Is the cost of a finder's fee to locate a new personal residence when I PCS a deductible moving expense?**

Yes. The Tax Reform Act of 1986, however, made moving expenses an itemized deduction, so you must complete Schedule A and Form 3903, or Form 3903F, and file them along with your income tax return.

28. *TAX TIP*: **What are the rules for substantiating employee business expenses?**

Basically, you need adequate written records of your expenditures. Ideally, you should prepare these records contemporaneously with the expenses, or as near to the time of the expense as possible. The IRS views with disfavor records created later because you are less likely to recall the expenses accurately.

29. *TAX TIP*: **What is the maximum IRA contribution that a couple filing jointly may make if one spouse has no income?**

The couple may contribute up to $2250 to an IRA. The Tax Reform Act limits this deduction, however, when a couple's adjusted gross income exceeds $40,000.

30. *TAX TIP*: **What is the maximum IRA contribution that a couple filing jointly may make when both spouses have earned income?**

The maximum contribution is $4000. This may be limited, however, if the couple's adjusted gross income exceeds $40,000.

31. *TAX TIP*: **Can I exclude FEI and still claim the child care credit for child care costs that are attributable to my foreign earned income?**

Yes.

32. *TAX TIP*: **Can I exclude FEI and claim a foreign tax credit for the foreign taxes attributable to my foreign earned income?**

No.

33. *TAX TIP*: **How can I claim the annual fee for my safe-deposit box?**

Assuming that you keep investment or tax-related documents in the box, you may claim the annual fee as a miscellaneous expense. Include it with other expenses in this category and deduct the amount by which the total of your miscellaneous expenses exceeds two percent of your adjusted gross income.

34. *TAX TIP*: **Are foreign sales taxes deductible from my income for federal income tax purposes?**

Usually, no. Only if you are operating a business and must pay foreign taxes on your supplies might the costs of these taxes be deductible.

35. *TAX TIP*: **Are state and local sales taxes still deductible?**

No. The Tax Reform Act of 1986 rescinded this deduction.

36. *TAX TIP*: **I am stationed overseas and would like my spouse to file on my behalf. Can my spouse prepare the joint return and sign my name to it?**

Your spouse may do so only if you have granted him or her a power of attorney authorizing him or her to do so. The IRS will accept a general power of attorney for this purpose if it specifically authorizes your spouse to act on your behalf in tax matters. Your local legal assistance office can prepare an appropriate power of attorney for you.

37. *TAX TIP*: **I earned $2300 baby sitting for fellow Americans in Korea last year. How much of it is taxable?**

None—if you meet either the residency test or physical presence test requirements, you can claim this money as foreign earned income. By filing Form 2555, Foreign Earned Income, you may exclude the money from your taxable income.

38. *TAX TIP*: **What is the maximum amount of moving expenses I can deduct for travel, meal and lodging expenses when I move from an old to a new residence?**

You may deduct all your expenses that relate directly to moving, but may deduct only eighty percent of your expenditures for food and beverages as moving expenses. The Tax Reform Act of 1986 made moving expenses an itemized deduction, so you must complete and file Schedule A and either Form 3903 or Form 3903F to claim these deductions.

39. *TAX TIP*: **What should I do if I am stateside, and I cannot file my return before the 15 April 1992 filing deadline, or if I am overseas and cannot meet the 15 June 1992 deadline?**

Fill out Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return, and receive an automatic extension until 15 August 1992 (the extended deadline for both stateside and overseas taxpayers). You can pick up this form at your legal assistance office.

40. *TAX TIP*: **Can I use summer camp expenses to increase my claim for the child care tax credit?**

No. The cost of overnight camp services do not qualify for the child and dependent care credit.

41. *TAX TIP*: **My son, who is ten, earned $500 from a bank account in 1991. Must he file a return?**

No. A child under fourteen must file a return only if his or her total income from investments in 1991 exceeds $550.

42. *TAX TIP*: **To what extent is my credit card and loan interest deductible?**

For 1991 tax returns, interest paid on personal loans no longer is deductible.

43. *TAX TIP*: **What is the "standard deduction" for 1991?**

For 1991, the standard deduction will be $3400 for single taxpayers, $5000 for taxpayers filing as head of household, $5700 for married taxpayers filing jointly or for taxpayers filing as qualifying widows or widowers, and $2850 for married taxpayers filing separately. Taxpayers who are sixty-five or older, or blind, have a special set of standard deductions.

44. *TAX TIP*: **What is the change in personal exemptions for 1991 tax returns?**

The personal exemption for 1991 is $2150. In 1990, it was $2050.

45. *TAX TIP*: To claim an exemption for a dependent who is one year old or older, you *must* have a social security number for the dependent, and you *must* report it on your 1991 tax return.[121]

46. *TAX TIP*: **I received a house with a fair market value of over $100,000 as a result of a divorce decree. Do I include this transfer on my 1991 tax return?**

No. Property transferred between spouses as a result of a divorce is not subject to tax upon transfer. You will be responsible, however, for paying tax on the gain you realize when you sell the home.

[121] *See generally* TJAGSA Practice Note, *Social Security Numbers for Dependents*, Dec. 1991, at 51.

47. *TAX TIP*: **I own my own home and live alone. Because I am the only person in the household, can I use the head-of-household tax rates?**

No. You may qualify as an unmarried head of household—and may benefit from an income tax rate lower than the rate that applies to single people—*only* if you pay more than half the cost of maintaining a home in which you live with a "qualifying individual," such as a child, stepchild, adopted child, foster child, or grandchild.

48. *TAX TIP*: **I gave a check to my church at Christmas time, but it wasn't cashed until the following year. Can I deduct the amount for the year I gave the check, or do I have to wait?**

You can claim the deduction on the return for the year you gave the check.

49. *TAX TIP*: **How has the investment interest limitation changed in 1991?**

Beginning this year, investment interest—that is, interest paid or accrued on debts a taxpayer incurred or continued to buy or to carry investment property—is deductible only up to net investment income.

50. *TAX TIP*: **Who may file as a "qualifying widow [or widower]"?**

You may file as qualifying widow or widower and may use joint return rates on your 1991 return if: (1) your spouse died in 1989 or 1990; (2) you did not remarry before 1992; (3) a dependent child, stepchild, adopted child, or foster child lived with you during 1991 and you paid over half the cost of maintaining your home; and (4) you were entitled to file jointly in the year of your spouse's death, even if you did not actually do so.

Major Hancock.

Professional Responsibility Notes

OTJAG Standards of Conduct Office

Ethical Awareness

The following summaries, which describe the application of the Army's Rules of Professional Conduct for Lawyers[1] to actual professional responsibility cases, may serve not only as precedents for future cases, but also as training vehicles for Army lawyers, regardless of their levels of experience, as they ponder difficult issues of professional discretion. The summaries deal with the rights warning requirement of article 31 of the Uniform Code of Military Justice (UCMJ).[2] A good parallel discussion for use in ethics training can be found in Trial Counsel Advocacy Program Memo Number 51, published in March 1990.[3] To stress education and to protect privacy, this office will publish the identity of neither the offices, nor the subjects, that are involved in the case studies. Mr. Eveland.

Case Summaries

Army Rule 4.4 (Respect for Rights of Third Persons)

An attorney, who deliberately failed to inform criminal suspects of their rights under UCMJ article 31 because the attorney felt that the immediate exigencies of military operations overrode the need to comply with statutory mandate, acted improperly.

During military operations overseas, an Army lieutenant on duty as a squadron element leader ordered some of

[1] Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers (31 Dec. 1987).

[2] Uniform Code of Military Justice, Art. 31, 10 U.S.C. § 831 (1988) provides:

> (a) No person subject to this chapter [10 U.S.C. § 801-936 (1988)] may compel any person to incriminate himself [or herself] or to answer any question the answer to which may tend to incriminate him [or her].
>
> (b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him [or her] of the nature of the accusation and advising him [or her] that he [or she] does not have to make any statement regarding the offense of which he [or she] is accused or suspected and that any statement made by him [or her] may be used as evidence against him [or her] in a trial by court-martial.
>
> (c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him [or her].
>
> (d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him [or her] in a trial by court-martial.

[3] *See* Alfred E. Arquilla, *Catching the Criminal at All Costs*, *in* Trial Counsel Advocacy Program Memo No. 51, at 2, 2-4 (1990); *see also* United States v. McCoy, 31 M.J. 323 (C.M.A. 1990).

his soldiers to misappropriate unsecured U.S. Army military vehicles. An Army attorney later learned that six soldiers in the element had admitted to moving the vehicles at the direction of the lieutenant. The attorney advised his senior commander that if article 31 rights warnings were not given to the soldiers, any statements they made could not be used in criminal prosecutions against them, but added that, given operational exigencies, the command needed to discover immediately who was behind the vehicle misappropriations. Neither the commander nor the attorney ever intended to use the statements directly against the subordinate soldiers.

The attorney next requested statements from six of the lieutenant's subordinates without warning them of their rights under article 31. The soldiers later told criminal investigators that the attorney had asked them to write statements, but had not advised them of any legal rights. The attorney himself acknowledged taking the six statements after making a conscious decision not to warn the soldiers of their rights.

Evidence pointed both ways whether the soldiers had been told that providing statements was mandatory, or voluntary. Although the attorney had not articulated the requests for statements to the soldiers in terms of testimonial immunity, they clearly remembered being told that their statements would not be used against them.

Professional Responsibility Decision

The major command (MACOM) staff judge advocate (SJA) issued a memorandum of counselling to the attorney for violating Army Rule 4.4, which provides:

> In representing a client, *a lawyer shall not* use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or *use methods of obtaining evidence that violate the legal rights of such a person.*[4]

The MACOM SJA concluded that, to obtain evidence against the lieutenant, the attorney deliberately had chosen to ignore the article 31 warning requirement when questioning the six soldiers. Article 31, however, is not merely a rule of evidence. It imposes an affirmative duty toward all persons suspected of offenses. A questioner must advise a suspect of his or her rights under article 31 before he or she may begin questioning, even if the suspect's answers are not solicited with a view toward incriminating the suspect. Mr. Eveland.

Army Rule 4.4 (Respect for Rights of Third Persons); Army Rule 3.8 (Special Responsibilities of a Trial Counsel)

A trial counsel improperly failed to advise a Government witness of the witness's article 31 rights before discussing with the witness incriminating evidence that had been found in the witness's diary.

During a meeting between a trial counsel and a government witness at an investigation, the witness, an Army officer, gave his personal diary to the trial counsel. The officer, whose credibility had been challenged at the investigation, offered the diary to corroborate the dates on which certain events had occurred. The diary showed that the officer had been romantically involved with an enlisted soldier, and that, even though the soldier had been restricted to camp as nonjudicial punishment, the officer had taken her away from the camp.

The diary implicated the officer under UCMJ articles 81 (conspiracy) and 77 (principals) for participating in the woman's breaking of restriction, as well as article 133 (conduct unbecoming an officer) and article 134 (soliciting another to commit an offense, requesting commission of an offense, breaking restriction, fraternization, false or unauthorized pass offense, and obstruction of justice). The trial counsel questioned the officer about the acts of misconduct without advising the officer of his article 31 rights.

The trial counsel kept the diary and properly reported the misconduct evidenced therein to the officer's superior, who issued the officer a letter of reprimand. In his rebuttal to the reprimand, the officer complained of the trial counsel's "intentional and willful violation of [his] privacy" and failure to provide an article 31 warning.

Professional Responsibility Decision

The Acting The Judge Advocate General reprimanded the trial counsel in writing. He found inexcusable that, despite the counsel's prior military justice experience, the counsel had launched into a discussion of the officer's misconduct, as evidenced in the diary, without following the clear legislative mandate of article 31. The trial counsel's failure to warn the officer of his rights under article 31 violated Army Rule 4.4 (respect for rights of third persons) and Rule 3.8 (special responsibilities of a trial counsel). Army Rule 3.8(b), in particular, requires trial counsel to "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel." Mr. Eveland.

[4] Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers, Rule 4.4 (31 Dec. 1987) (emphasis added).

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7115, extension 307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1992

3-7 February: 28th Criminal Trial Advocacy Course (5F-F32).

10-14 February: 110th Senior Officers Legal Orientation (5F-F1).

24 February-6 March: 126th Contract Attorneys Course (5F-F10).

9-13 March: 30th Legal Assistance Course (5F-F23).

16-20 March: 50th Law of War Workshop (5F-F42).

23-27 March: 16th Administrative Law for Military Installations Course (5F-F24).

30 March-3 April: 6th Government Materiel Acquisition Course (5F-F17).

6-10 April: 111th Senior Officers Legal Orientation (5F-F1).

13-17 April: 12th Operational Law Seminar (5F-F47).

13-17 April: 3d Law for Legal NCO's Course (512-71D/E/20/30).

21-24 April: Reserve Component Judge Advocate Workshop (5F-F56).

27 April-8 May: 127th Contract Attorneys Course (5F-F10).

18-22 May: 34th Fiscal Law Course (5F-F12).

18-22 May: 41st Federal Labor Relations Course (5F-F22).

18 May-5 June: 35th Military Judge Course (5F-F33).

1-5 June: 112th Senior Officers Legal Orientation (5F-F1).

8-10 June: 8th SJA Spouses' Course (5F-F60).

8-12 June: 22d Staff Judge Advocate Course (5F-F52).

15-26 June: JATT Team Training (5F-F57).

15-26 June: JAOAC (Phase II) (5F-F55).

6-10 July: 3d Legal Administrators Course (7A-550A1).

8-10 July: 23d Methods of Instruction Course (5F-F70).

13-17 July: U.S. Army Claims Service Training Seminar.

13-17 July: 4th STARC JA Mobilization and Training Workshop.

15-17 July: Professional Recruiting Training Seminar.

20 July-25 September: 128th Basic Course (5-27-C20).

20-31 July: 128th Contract Attorneys Course (5F-F10).

3 August-14 May 93: 41st Graduate Course (5-27-C22).

3-7 August: 51st Law of War Workshop (5F-F42).

10-14 August: 16th Criminal Law New Developments Course (5F-F35).

17-21 August: 3d Senior Legal NCO Management Course (512-71D/E/40/50).

24-28 August: 113th Senior Officers Legal Orientation (5F-F1).

31 August-4 September: 13th Operational Law Seminar (5F-F47).

14-18 September: 9th Contract Claims, Litigation, and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

April 1992

7-10: ESI, Contract Pricing, Washington, D.C.

7-10: ESI, Continuous Improvement and Total Quality Management, Washington, D.C.

14-15: ESI, Changes, Washington, D.C.

14-16: GWU, Source Selection Workshop/Competitive Proposals, Washington, D.C.

20-24: ESI, Federal Contracting Basics, Vienna, VA.

23: GWU, Suspension and Debarment, Washington, D.C.

27-May 1: ESI, Accounting for Costs on Government Contracts, Washington, D.C.

30-May 1: SLF, Institute on Wills and Probate, Westin, TX.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the August 1991 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Thirty-six states currently have a mandatory continuing legal education (CLE) requirement.

In these mandatory CLE (MCLE) states, all *active* attorneys are required to attend approved continuing legal education programs for a specified number of hours each year or over a period of years. Additionally, bar members are required to report periodically either their compliance or reason for exemption from compliance. Recognizing the variety of these MCLE programs, JAGC Personnel Policies, para. 7-11*c* (Oct. 1988) provides that staying abreast of state bar requirements is the responsibility of the individual judge advocate. State bar membership requirements and the availability of exemptions or waivers of MCLE requirements for military personnel vary from jurisdiction to jurisdiction and are subject to change. TJAGSA *resident* CLE courses have been approved by most MCLE jurisdictions.

Listed below are those jurisdictions that have adopted some form of mandatory continuing legal education, together with a brief description of each state's requirement, the addresses of local bar officials, and the reporting dates. The "*" indicates that the state has approved TJAGSA *resident* CLE courses.

State	Local Official	CLE Requirements
*Alabama	MCLE Commission Alabama State Bar 415 Dexter Ave. Montgomery, AL 36104 205-269-1515	-Twelve hours per year. -Active duty military attorneys are exempt but must declare exemption. -Reporting date: 31 December.
Arizona	Director, Programs and Public Services Division 363 North First Ave. Phoenix, AZ 85003 602-252-4804	-Fifteen hours each year including two hours professional responsibility. -Reporting date: 15 July.
*Arkansas	Director of Professional Programs 1501 N. University #311 Little Rock, AR 72207 501-664-8737	-Twelve hours per year. -Reporting date: 30 June.
*Colorado	CLE Dominion Plaza Building 600 17th St. Suite 520-S Denver, CO 80202 303-893-8094	-Forty-five hours, including two hours of legal ethics during three-year period. -Newly admitted attorneys must also complete fifteen hours in basic legal and trial skills within three years. -Reporting date: Anytime within three-year period.
California	State Bar of California 100 Van Ness 28th Floor San Francisco, CA 94102 415-241-2100	-Thirty-six hours every thirty-six months. Eight hours must be on legal ethics and/or law practice management, with at least four hours in legal ethics, one hour of substance abuse and emotional distress, and one hour on the elimination of bias. -Attorneys employed by the Federal Government are exempt. -Reporting date: Effective 1 February 1992. Credits earned from 1 September 1991 may be carried forward to the initial compliance period.

State	Local Official	CLE Requirements
*Delaware	Commission on CLE 831 Tatnall Street Wilmington, DE 19801 302-658-5856	-Thirty hours during two-year period. -Reporting date: 31 July.
*Florida	Director, Legal Specialization & Education The Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 904-561-5690	-Thirty hours during three-year period, including two hours of legal ethics. -Active duty military are exempt but must declare exemption during reporting period. -Reporting date: Assigned month every three years.
*Georgia	Georgia Commission on Continuing Lawyer Competency 800 The Hurt Building 50 Hurt Plaza Atlanta, GA 30303 404-527-8710	-Twelve hours per year, including one hour legal ethics, one hour professionalism and three hours trial practice (trial attorneys only). -Reporting date: 31 January.
*Idaho	Deputy Director Idaho State Bar P.O. Box 895 Boise, ID 83701-0898 208-342-8959	-Thirty hours during three-year period. -Reporting date: Every third year depending on year of admission.
*Indiana	Indiana Commission for CLE 101 West Ohio Suite 410 Indianapolis, IN 46204 317-232-1943	-Thirty-six hours within a three-year period (minimum six hours per year). -New admittees by examination are given three-year grace period beginning 1 January before admission. -Reporting date: 31 December.
*Iowa	Executive Director Commission on CLE State Capitol Des Moines, IA 50319 515-281-3718	-Fifteen hours each year, including two hours of legal ethics during two-year period. -Reporting date: 1 March.
*Kansas	CLE Commission Kansas Judicial Center 301 West 10th Street Room 23-S Topeka, KS 66612-1507 913-357-6510	-Twelve hours each year. -Reporting date: 1 July.
*Kentucky	CLE Kentucky Bar Association W. Main at Kentucky River Frankfort, KY 40601 502-564-3795	-Fifteen hours per year, including two hours of legal ethics. -Bridge the Gap Training for new attorneys. -Reporting date: June 30.
*Louisiana	CLE Coordinator Louisiana State Bar Association 601 St. Charles Ave. New Orleans, LA 70130 504-566-1600	-Fifteen hours per year, including one hour of legal ethics. -Active duty military are exempt but must declare exemption. -Reporting date: 31 January.

State	Local Official	CLE Requirements
Michigan	Executive Director State Bar of Michigan 306 Townsend St. Lansing, MI 48933 517-372-9030	-Thirty or thirty-six hours (depending on whether admitted in first or second half of fiscal year) within three years of becoming active member of bar. Six or twelve hours the first year, twelve hours in the second year and twelve hours in the third year. Courses must be taken in sequence identified by CLE Commission. -Reporting date: 31 March
*Minnesota	Director, Minnesota State Board of CLE 1 West Water St., Suite 250 St. Paul, MN 55107 612-297-1800	-Forty-five hours during three-year period. -Reporting date: 30 August.
*Mississippi	CLE Administrator Mississippi Commission on CLE P.O. Box 2168 Jackson, MS 39225-2168 601-948-4471	-Twelve hours per year. -Active duty military attorneys are exempt, but must declare exemption. -Reporting date: 31 December. (Mississippi presently is in the process of changing this date to 1 August).
*Missouri	Director of Programs P.O. Box 119 Jefferson City, MO 65102 314-635-4128	-Fifteen hours per year, including three hours legal ethics every three years. -New admittees three hours professionalism, legal/judicial ethics, or malpractice in twelve months. -Reporting date: 31 July.
*Montana	MCLE Administrator Montana Board of CLE P.O. Box 577 Helena, MT 59624 406-442-7660	-Fifteen hours per year. -Reporting date: 1 March.
*Nevada	Executive Director Board of CLE 295 Holcomb Avenue Suite 5-A Reno, NV 89502 702-329-4443	-Ten hours per year. -Reporting date: 1 March.
*New Mexico	MCLE Administrator P.O. Box 25883 Albuquerque, NM 87125 505-842-6132	-Fifteen hours per year, including one hour of legal ethics. -Reporting date: Thirty days after program.
*North Carolina	Executive Director The North Carolina State Bar 208 Fayetteville Street Mall P.O. Box 25148 Raleigh, NC 27611 919-733-0123	-Twelve hours per year including two hours of legal ethics. Special three-hour block of ethics once every three years. -New attorneys nine hours practical skills each of first three years of practice. -Armed Service members on full-time active duty exempt, but must declare exemption. -Reporting date: 28 February of succeeding year.
*North Dakota	North Dakota CLE Commission P.O. Box 2136 Bismark, ND 58502 01-255-1404	-Forty-five hours during three-year period. -Reporting date: period ends 30 June; affidavit must be received by 31 July.

State	Local Official	CLE Requirements
*Ohio	Secretary of the Supreme Court Commission on CLE 30 East Broad Street Second Floor Columbus, OH 43266-0419 614-644-5470	-Twenty-four hours during two-year period, including two hours of legal ethics or professional responsibility every cycle, including instruction on substance abuse. -Active duty military are exempt, but must pay a filing fee. -Reporting date: every two years by 31 January.
*Oklahoma	MCLE Administrator Oklahoma State Bar P.O. Box 53036 Oklahoma City, OK 73152 405-524-2365	-Twelve hours per year, including one hour of legal ethics. -Active duty military are exempt, but must declare exemption. -Reporting date: 15 February.
*Oregon	MCLE Administrator Oregon State Bar 5200 SW. Meadows Road P.O. Box 1689 Lake Oswego, OR 97034-0889 503-620-0222-ext. 368	-Forty-five hours during three-year period, including six hours of legal ethics. New admittees—fifteen hours, ten must be in practical skills and two in ethics. -Reporting date: Initially date of birth; thereafter all reporting periods end every three years except new admittees and reinstated members—an initial one-year period.
*South Carolina	Administrative Director Commission on Continuing Lawyer Competence P.O. Box 2138 Columbia, SC 29202 803-799-5578	-Twelve hours per year, including six hours ethics/professional responsibility every three years in addition to annual MCLE requirement. -Active duty military attorneys are exempt, but must declare exemption. -Reporting date: 15 January.
*Tennessee	Executive Director Commission on CLE 214 2nd Ave. Suite 104 Nashville, TN 37201 615-242-6442	-Twelve hours per year. -Active duty military attorneys are exempt. -Reporting date: 1 March.
*Texas	Director of MCLE Texas State Bar Box 12487 Capital Station Austin, TX 78711 512-463-1442	-Fifteen hours per year, including one hour of legal ethics. -Reporting date: Last day of birthmonth yearly.
*Utah	MCLE Administrator 645 S. 200 E. Salt Lake City, UT 84111-3834 801-531-9077 800-662-9054	-Twenty-four hours during two-year period, plus three hours of legal ethics. -Reporting date: End of two-year period.
*Vermont	Directors, MCLE Pavilion Office Building Post Office Montpelier, VT 05602 802-828-3281	-Twenty hours during two-year period, including two hours of legal ethics. -Reporting date: 15 July.

State	Local Official	CLE Requirements
*Virginia	Director of MCLE Virginia State Bar 801 East Main Street 10th Floor Richmond, VA 23219 804-786-5973	-Eight hours per year. -Reporting date: 30 June (annual license renewal).
*Washington	Executive Secretary Washington State Board of CLE 500 Westin Building 2001 6th Ave. Seattle, WA 98121-2599 206-448-0433	-Fifteen hours per year. -Reporting date: 31 January (May for supplementals with late filing fee; fifty dollars in the first year; $150 in the second year; $250 in the third year, etc.).
*West Virginia	MCLE Coordinator West Virginia State Bar State Capitol Charleston, WV 25305 304-348-2456	-Twenty-four hours every two years, at least three hours must be in legal ethics or office management. -Reporting date: 30 June.
*Wisconsin	Director Board of Attorneys Professional Competence 119 Martin Luther King, Jr. Boulevard Room 405 Madison, WI 53703-3355 608-266-9760	-Thirty hours during two-year period. -Reporting date: 20 January every other year.
*Wyoming	Wyoming State Bar P.O. Box 109 Cheyenne, WY 82003-0109 307-632-9061	-Fifteen hours per year. -Reporting date: 30 January.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who cannot attend courses in their practice areas. The School receives many requests each year for these materials. Because this distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of these materials are being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. Offices and other organizations may request the necessary information and forms to register as a user from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided with biweekly and cumulative indices. These indices are classified as a single confidential document and are mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are

available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

*AD A239203 Government Contract Law Deskbook Vol. 1/JA-505-1-91 (332 pgs).

*AD A239204 Government Contract Law Deskbook, Vol. 2/JA-505-2-91 (276 pgs).

AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).

*AD A241652 Office Administration Guide/JA 271-91 (222 pgs).

AD B135492 Legal Assistance Consumer Law Guide /JAGS-ADA-89-3 (609 pgs).

AD B141421 Legal Assistance Attorney's Federal Income Tax Guide/JA-266-90 (230 pgs).

AD B147096 Legal Assistance Guide: Office Directory/JA-267-90 (178 pgs).

*AD A241255 Model Tax Assistance Guide/JA 275-91 (66 pgs).

AD B147389 Legal Assistance Guide: Notarial/ JA-268-90 (134 pgs).

AD B147390 Legal Assistance Guide: Real Property/ JA-261-90 (294 pgs).

AD A228272 Legal Assistance: Preventive Law Series/ JA-276-90 (200 pgs).

AD A229781 Legal Assistance Guide: Family Law/ ACIL-ST-263-90 (711 pgs).

AD A230991 Legal Assistance Guide: Wills/JA-262-90 (488 pgs).

AD A230618 Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-91 (73 pgs).

AD B156056 Legal Assistance: Living Wills Guide/ JA-273-91 (171 pgs).

Administrative and Civil Law

*AD A239554 Government Information Practices/ JA-235(91) (324 pgs).

*AD A240047 Defensive Federal Litigation/JA-200(91) (838 pgs).

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD A236663 Reports of Survey and Line of Duty Determinations/JA 231-91 (91 pgs).

AD A237433 AR 15-6 Investigations: Programmed Instruction/JA-281-91R (50 pgs).

Labor Law

*AD A239202 Law of Federal Employment/JA-210-91 (484 pgs).

AD A236851 The Law of Federal Labor-Management Relations/JA-211-91 (487 pgs).

Developments, Doctrine & Literature

AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B100212 Reserve Component Criminal Law PEs/ JAGS-ADC-86-1 (88 pgs).

AD B135506 Criminal Law Deskbook Crimes and Defenses/JAGS-ADC-89-1 (205 pgs).

AD B137070 Criminal Law, Unauthorized Absences/ JAGS-ADC-89-3 (87 pgs).

AD B140529 Criminal Law, Nonjudicial Punishment/ JAGS-ADC-89-4 (43 pgs).

AD A236860 Senior Officers' Legal Orientation/JA 320-91 (254 pgs).

AD B140543L Trial Counsel and Defense Counsel Handbook/JA 310-91 (448 pgs).

AD A233621 United States Attorney Prosecutors/ JA-338-91 (331 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

a. *Obtaining Manuals for Courts-Martial, DA Pams, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from AR 25-30 is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(*1*) *Active Army.*

(*a*) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam 25-33.)

(*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*c*) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (*b*) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*3*) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*4*) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the Baltimore USAPDC at (301) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. This office may be reached at (301) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

(6) Navy, Air Force, and Marine JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Telephone (301) 671-4335.

b. Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 11-3	Department of the Army Functional Review	12 Sep 91
AR 25-35	Joint Technical Coordinating Group for Munitions Effectiveness (JTCG/ME) Publications	15 Aug 91

AR 40-10	Health Hazard Assessment Program in Support of the Army Materiel Acquisition Decision Process	1 Oct 91
AR 600-8-19	Enlisted Promotions and Reductions	1 Nov 91
AR 600-8-103	Battalion S1	16 Sep 91
AR 601-210	Regular Army and Army Reserve Enlistment Program	1 Aug 91
AR 640-30	Photographs for Military Personnel Files	1 Oct 91
CIR 750-91-1	Army Award for Maintenance Excellence (FY 92 and 93 Programs)	30 Sep 91
DA Pam 600-45	Army Communities	Aug 91
UPDATE 13	Maintenance Management	27 Sep 91

3. OTJAG Bulletin Board System.

a. Numerous TJAGSA publications are available on the OTJAG Bulletin Board System (OTJAG BBS). Users can sign on the OTJAG BBS by dialing (703) 693-4143 with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and will then instruct them that they can use the OTJAG BBS after they receive membership confirmation, which takes approximately forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the OTJAG BBS. Following are instructions for downloading publications and a list of TJAGSA publications that currently are available on the OTJAG BBS. The TJAGSA Literature and Publications Office welcomes suggestions that would make accessing, downloading, printing, and distributing OTJAG BBS publications easier and more efficient. Please send suggestions to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781.

b. *Instructions for Downloading Files From the OTJAG Bulletin Board System.*

(1) Log-on to the OTJAG BBS using ENABLE and the communications parameters listed in subparagraph a above.

(2) If you never have downloaded files before, you will need the file decompression program that the OTJAG BBS uses to facilitate rapid transfer of files over the phone lines. This program is known as the PKZIP utility. To download it onto your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12].

(c) Once you have joined the Automation Conference, enter [d] to Download a file.

(d) When prompted to select a file name, enter [pkz110.exe]. This is the PKZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. From this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(g) The menu then will ask for a file name. Enter [c:\pkz110.exe].

(h) The OTJAG BBS and your computer will take over from here. Downloading the file takes about twenty minutes. Your computer will beep when file transfer is complete. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off of the OTJAG BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C> prompt. The PKZIP utility then will execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKZIP utility program.

(3) To download a file, after logging on to the OTJAG BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c below.

(c) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the OTJAG BBS responds with the time and size data, type F10. From the top-line menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(e) When asked to enter a filename, enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. When you hear a beep, file transfer is complete, and the file you downloaded will have been saved on your hard drive.

(g) After file transfer is complete, log-off of the OTJAG BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not a compressed, you can use it on ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the OTJAG BBS). The PKZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "xxxxx.DOC" by following the instructions in paragraph 4(a) above.

c. *TJAGSA Publications available through the OTJAG BBS.* Below is a list of publications available through the OTJAG BBS. The file names and descriptions appearing in bold print denote new or updated publications. All active Army JAG offices, and all Reserve and National Guard organizations having computer telecommunications capabilities, should download desired publications from the OTJAG BBS using the instructions in paragraphs a and b above. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having a bona fide military need for these publications, may request computer diskettes containing the publications listed below from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Doctrine, Developments, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781. Requests must be accompanied by one 5¼-inch or 3½-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

Filename	Title
121CAC.ZIP	The April 1990 Contract Law Deskbook from the 121st Contract Attorneys Course
1990YIR.ZIP	1990 Contract Law Year in Review in ASCII format. It was originally provided at the 1991 Government Contract Law Symposium at TJAGSA
505-1.ZIP	TJAGSA Contract Law Deskbook, Vol. 1, May 1991
505-2.ZIP	TJAGSA Contract Law Deskbook, Vol. 2, May 1991
506.ZIP	TJAGSA Fiscal Law Deskbook, May 1991
ALAW.ZIP	Army Lawyer and Military Law Review Database in ENABLE 2.15. Updated through 1989 Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF
CCLR.ZIP	Contract Claims, Litigation, & Remedies
FISCALBK.ZIP	The November 1990 Fiscal Law Deskbook from the Contract Law Division, TJAGSA
FISCALBK.ZIP	May 1990 Fiscal Law Course Deskbook in ASCII format
JA200A.ZIP	Defensive Federal Litigation 1
JA200B.ZIP	Defensive Federal Litigation 2
JA210A.ZIP	Law of Federal Employment 1
JA210B.ZIP	Law of Federal Employment 2
JA231.ZIP	Reports of Survey & Line of Duty Determinations Programmed Instruction.
JA235.ZIP	Government Information Practices
JA240PT1.ZIP	Claims—Programmed Text 1
JA240PT2.ZIP	Claims—Programmed Text 2
JA241.ZIP	Federal Tort Claims Act
JA260.ZIP	Soldiers' & Sailors' Civil Relief Act
JA261.ZIP	Legal Assistance Real Property Guide
JA262.ZIP	Legal Assistance Wills Guide
JA263A.ZIP	Legal Assistance Family Law 1
JA265A.ZIP	Legal Assistance Consumer Law Guide 1
JA265B.ZIP	Legal Assistance Consumer Law Guide 2
JA265C.ZIP	Legal Assistance Consumer Law Guide 3
JA266.ZIP	Legal Assistance Attorney's Federal Income Tax Supplement
JA267.ZIP	Army Legal Assistance Information Directory
JA268.ZIP	Legal Assistance Notorial Guide
JA269.ZIP	Federal Tax Information Series

JA271.ZIP	Legal Assistance Office Administration
JA272.ZIP	Legal Assistance Deployment Guide
JA281.ZIP	AR 15-6 Investigations
JA285A.ZIP	Senior Officer's Legal Orientation 1
JA285B.ZIP	Senior Officer's Legal Orientation 2
JA290.ZIP	SJA Office Manager's Handbook
JA296A.ZIP	Administrative & Civil Law Handbook 1
JA296B.ZIP	Administrative & Civil Law Handbook 2
JA296C.ZIP	Administrative & Civil Law Handbook 3
JA296D.ZIP	Administrative & Civil Law Deskbook 4
JA296F.ARC	Administrative & Civil Law Deskbook 6
JA301.ZIP	Unauthorized Absence—Programed Instruction, TJAGSA Criminal Law Division
JA310.ZIP	Trial Counsel and Defense Counsel Handbook, TJAGSA Criminal Law Division
JA320.ZIP	Senior Officers' Legal Orientation Criminal Law Text
JA330.ZIP	Nonjudicial Punishment—Programmed Instruction, TJAGSA Criminal Law Division
JA337.ZIP	Crimes and Defenses Deskbook (DOWNLOAD ON HARD DRIVE ONLY.)
YIR89.ZIP	Contract Law Year in Review—1989

4. TJAGSA Information Management Items.

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

The TJAGSA Automation Management Officer also is compiling a list of JAG Corps e-mail addresses. If you have an account accessible through either DDN or PROFS (TRADOC system) please send a message containing your e-mail address to the postmaster address for DDN, or to "crankc(lee)" for PROFS.

b. Personnel desiring to reach someone at TJAGSA via autovon should dial 274-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6- plus the three-digit extension you want to reach.

d. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System.

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are autovon 274-7115 ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

b. The following material has been declared excess and is available for transfer.

1. Headquarters, U.S. Army, Japan/IX Corps, Unit 45005, APO Pacific 96343-0054. Point of Contact: CW2 Mariko V. Dye, autovon 233-3013

Court-Martial Reports, 2 complete sets

West's Military Justice Reporter, vols. 1-32 (1 set), vols. 1-12 (2 sets), vols. 9 & 10 (1 each)

Federal Supplement, vols. 1-492

Trial of the Major War Criminals (Int'l Military Tribunal-Nuremberg)

2. Headquarters, Army & Air Force Exchange Service-Pacific, 919 Ala Moana, Honolulu, Hawaii 96814-4999. Point of Contact: Mrs. Marge L. Chang, (803) 533-8471

Contract Appeals Decisions

Corpus Juris Secundum

Decisions of the Comptroller General Procurement Decisions

Digest of Opinions

Hawaii Law Digest

Modern Legal Forms

US Treaties & International Agreements

US Court of Claims Reports

US Supreme Court Digest

3. Staff Judge Advocate, United States Military Academy, West Point, NY 10996. Point of Contact: CW3 Gary W. Dodge, autovon 688-2781/4570 or commercial: (914) 938-2781/4570

ALR Federal, 1-99, less vol. 71

ALR 2d Later Case Service 1-100

ALR 2d, 1-100

ALR 2d, Digest

ALR 2d Word Index

ALR 3d, 1-100

ALR 4th, 1-80

ALR 3d/4th Digest

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